(1)

Supreme Court, U.S.
FILED

No. 04 556 OCT 2 1 2004

OFFICE OF THE CLERK

IN THE

United States Supreme Court

ALFRED LENOCI, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Ira B. Grudberg
(Counsel of Record)
JACOBS, GRUDBERG, BELT & DOW, P.C.
350 Orange Street
New Haven, Connecticut 06511
203-772-3100

October 21, 2004

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Does United States Sentencing Guideline § 3D1.2(d) require the grouping of multiple counts falling under virtually identical offense guidelines appearing on § 3D1.2(d)'s list of offenses "to be grouped?"

2. The Second Circuit concluded that the Government's request for an offense level increase under United States Sentencing Guideline § 2C1.1(b)(1) would not violate petitioner's plea agreement. Was this finding contrary to prior Second Circuit precedent, namely, *United States v. Palladino*, 347 F.3d 29 (2d Cir. 2003)?

3. To the extent the district court made findings of fact not admitted to, or disputed by, petitioner to determine whether the harm resulting from his offenses could be aggregated for grouping purposes under United States Sentencing Guideline § 3D1.2(d), did those findings violate petitioner's rights under the Sixth Amendment as explained in *Blakely v. Washington*, __ U.S. __, 124 S.Ct. 2531, 159 L.Ed.2d. 403 (2004)?

PARTIES TO THE PROCEEDING

The parties to this proceeding are Alfred Lenoci, Sr., Petitioner, and the United States of America, Respondent.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS............................ iii

TABLE OF AUTHORITIES iv

PETITION FOR A WRIT OF CERTIORARI...... 1

OPINIONS BELOW AND JURISDICTION....... 1

RELEVANT STATUTORY PROVISION.......... 1

STATEMENT 1

REASONS FOR GRANTING THE WRIT 6

CONCLUSION..................................... 14

TABLE OF AUTHORITIES

Federal Cases *Page*

Blakely v. Washington, __ U.S. __, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)................12, 13, 14

United States v. Buenrostro-Torres, 24 F.3d 1173 (9th Cir. 1994).................................. 8, 9

United States v. Emerson, 128 F.3d 557 (7th Cir. 1997).................................. 8

United States v. Ferrara, 954 F.2d 103 (2d Cir. 1992) 11

United States v. Fitzgerald, 232 F.3d 315 (2d Cir. 2000) 4

United States v. Gordon, 291 F.3d 181 (2d Cir. 2002) 4

United States v. Harper, 972 F.2d 321 (11th Cir. 1992) 7

United States v. Johnson, 971 F.2d 562 (10th Cir. 1992) 7

United States v. Lenoci, 377 F.3d 246 (2d Cir. 2004).........................1, 4, 9, 10, 13

United States v. Myers, 198 F.3d 160 (5th Cir. 1999).................................. 7

United States v. Napoli, 179 F.3d 1 (2d Cir. 1999) 4, 7

United States v. Palladino, 347 F.3d 29 (2d Cir. 2003).............................5, 6, 11, 12

Page

United States v. Penaranda, 375 F.3d 238 (2d Cir. 2004) 13, 14

United States v. Petrillo, 237 F.3d 119 (2d Cir. 2000) 4

United States v. Rudolph, 137 F.3d 173 (3d Cir. 1998) 7

United States v. Seligsohn, 981 F.2d 1418 (3d Cir. 1993) 7

United States v. Taylor, 984 F.2d 298 (9th Cir. 1993).................................. 7

United States v. Tolbert, 306 F.3d 244 (5th Cir. 2002).................................. 9

United States v. Williams, 154 F.3d 655 (6th Cir. 1998).................................. 7

United States v. Zanghi, 189 F.3d 71 (1st Cir. 1999).................................. 8

Federal Statutes

18 U.S.C. § 666 1

18 U.S.C. § 1341 1

18 U.S.C. § 1346 1

18 U.S.C. § 3742 3

28 U.S.C. § 1254 1

28 U.S.C. § 1291 3

Page

Federal Sentencing Guidelines

USSG § 2B1.1 8

USSG § 2C1.1 .... 1, 2, 3, 5, 6, 9, 10

USSG § 2C1.7 .... 1, 3, 9

USSG § 3D1.2 .... *passim*

USSG § 2F1.1 .... 8, 9

USSG § 3E1.1 2

USSG § 5K1.1 3

Appendices

Appendix A — Opinion of the United States Court of Appeals for the Second Circuit, dated July 28, 2004 .... 1a

Appendix B — Sentencing Opinion of the United States District Court for the District of Connecticut, dated July 22, 2003 ... 27a

Appendix C — Relevant Provisions of the United States Sentencing Guidelines 97a

PETITION FOR A WRIT OF CERTIORARI

Petitioner Alfred Lenoci, Sr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW AND JURISDICTION

The opinion of the Second Circuit is entitled *United States v. Lenoci*, 377 F.3d 246 (2d Cir. July 28, 2004). (Pet. App. 1a - 26a). The sentencing opinion of the district court is unpublished. (Pet. App. 27a - 96a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Petitioner's appeal to the United States Court of Appeals for the Second Circuit involved the application of United States Sentencing Guideline § 3D1.2(d). United States Sentencing Guidelines § 2C1.1 and § 2C1.7 were also relevant to the inquiry. The full text of each Guideline is set out in Petitioner's Appendix at (Pet. App. 97a - 102a).

STATEMENT

1. On October 19, 2001, petitioner, Alfred Lenoci, Sr., pursuant to a plea agreement with the government, pled guilty to one count of Bribery in violation of 18 U.S.C. § 666(a)(2) and one count of Theft of Honest Services Mail Fraud in violation of 18 U.S.C. § 1341 and § 1346.

2. At his plea allocution, petitioner disputed certain factual characterizations made by the government with respect to construction projects underlying petitioner's

offenses, facts that involved the nature of the harm caused by those offenses.

3. Petitioner was sentenced in the United States District Court for the District of Connecticut (Arterton, J.) over the course of two hearings.

4. In the first Presentence report, the United States Probation Office recommended that the bribery and theft of honest services counts be grouped pursuant to USSG § 3D1.2(d) because the offense level was based largely on the total amount of harm. In his presentencing submissions to the United States Probation Office, petitioner agreed that the counts should be grouped under USSG § 3D1.2, either under subsection (c) or (d), resulting in a final offense level of 15 and a sentencing range of 18 - 24 months (taking into account a 3 level reduction for acceptance of responsibility under USSG § 3E1.1). The government disagreed in its presentencing submissions. Specifically, it argued that the counts should not be grouped under USSG § 3D1.2 because they involved separate victims and separate transactions. Under the government's non-grouping theory, petitioner's offense level would be 17 with a corresponding imprisonment range of 24 to 30 months.

5. Nowhere in the plea agreement did the parties, on either count, stipulate to a two-level increase under USSG § 2C1.1(b)(1) for multiple bribes. The government did not reserve its right to press for such an increase at sentencing. Petitioner was unaware that the government was pressing for the two-level increase until the day prior to sentencing, when counsel received the Fifth Addendum to the presentence report noting the government was advocating that such an increase was appropriate if the counts were to be grouped.

6. The district court initially considered the incarceration portion of petitioner's sentence on July 22, 2003. The parties argued their presentencing positions as to grouping. The court below declined to group counts one and two, concluding that the two counts were driven by different purposes such that the "aggregate value" necessary for grouping under USSG § 3D1.2 was absent. The district court did not reach the two-level enhancement issue.

7. The district court sentenced defendant on an offense level of 17 and an imprisonment range of 24 to 30 months. After granting the government's motion for a downward departure pursuant to USSG § 5K1.1, the district court sentenced Petitioner to twelve months and one day imprisonment on each count concurrently. On July 30, 2003, the district court imposed a $50,000 fine on petitioner, declining to depart upward. Sentence was imposed on August 1, 2003. Petitioner timely appealed his sentence to the United States Court of Appeals for the Second Circuit which had appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

8. In his appeal, petitioner argued that his offenses under U.S.S.G. § 2C1.1 and U.S.S.G. § 2C1.7 should have been grouped under U.S.S.G. § 3D1.2(d) because they measured harm in nearly identical ways. In particular, petitioner argued that the district court failed to analyze properly whether both offenses measured harm in monetary values—and whether they did so in the same manner, as required by Second Circuit precedent. Because grouping under § 3D1.2(d) is not optional when multiple counts meet that section's grouping requirements, petitioner maintained that the district court erred in failing to group them when sentencing defendant. *See United States v.*

Gordon, 291 F.3d 181, 190 (2d Cir. 2002), *cert. denied*, 537 U.S. 1114 (2003).

9. The government contended that the offense level for the theft of honest services count was determined by the monetary amount paid to a state government employee, Mark Trinkley, and the offense level for the bribery count was determined by Mayor Joseph Ganim's status as an elected official. The government argued that, under those circumstances, the offense calculation for the bribery count did not include any consideration of the monetary amounts paid to Ganim or any factor in common with the Trinkley payments. Thus, the government contended that the calculations for the two counts did not involve the "aggregate value" necessary for grouping. Second Circuit precedent, however, holds that determining whether disparate offenses should be grouped under § 3D1.2(d) centers on the manner in which the offense guidelines themselves measure harm or loss, not how those guidelines are applied, or calculated. *See, e.g. United States v. Napoli*, 179 F.3d 1, 6 (2d Cir. 1999), *cert. denied*, 528 U.S. 1162 (2000); *United States v. Fitzgerald*, 232 F.3d 315 (2d Cir. 2000); *United States v. Petrillo*, 237 F.3d 119, 124-25 (2d Cir. 2000).

10. In its decision, the Second Circuit focused on the language of USSG § 3D1.2(d), finding that the guidelines were not "entirely clear as to what is 'to be grouped' under § 3D1.2(d)." *United States v. Lenoci*, 377 F.3d 246, 252 (2d Cir. 2004). After setting forth three potential interpretations of that language, and surveying the divergent holdings of its sister circuits, the Second Circuit sympathized with the view that multiple counts of the same offense included in the "to be grouped" list should be grouped. *Id.*

at 253-55. The court further reasoned that it would be inconsistent to require the grouping of counts falling under identical "to be grouped" guidelines, but not to require the grouping of counts falling under *virtually* identical "to be grouped" guidelines, as occurred in this case. The Second Circuit also queried whether mandatory grouping under the "to be grouped" language of USSG § 3D1.2(d) should be limited based on whether the relevant offense level calculations primarily involve some measure of harm that *can* be aggregated. *Id.* at 255.

11. Notwithstanding the Second Circuit's clear identification of an important interpretational problem with USSG § 3D1.2(d)—which directly affects the length of a criminal defendant's sentence—it failed to resolve the issue. Instead, the court below held that any grouping error by the district court was harmless because the government would be entitled to a two-level increase under USSG § 2C1.1(b)(1) if the counts were grouped. This enhancement would increase petitioner's offense level to 17, the non-grouped level at which he was actually sentenced. The court below held that the two-level increase would not violate petitioner's plea agreement. This holding, however, contradicted the earlier Second Circuit decision of *United States v. Palladino*, 347 F.3d 29 (2d Cir. 2003) which held that the government breached a plea agreement when it sought a six-point sentencing enhancement based on conduct which was known to the government at the time of the plea agreement, but not included in the government's estimated offense level in the plea agreement. The *Palladino* court based its reasoning on the "spirit of the plea agreement" and the defendant's reasonable expectations in view of the plea negotiations, as well as the government's prior position. Despite the stark similarity to *Palladino*, the

Second Circuit held to the contrary, concluding that the two-level increase under USSG § 2C1.1(b)(1) did not violate petitioner's plea agreement. The Second Circuit's decision, which did not discuss *Palladino* even though argued by petitioner, was erroneous.

12. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

As the United States Court of Appeals for the Second Circuit acknowledged in this case, it is unclear whether the "to be grouped" language used by the United States Sentencing Commission in USSG § 3D1.2(d) mandates grouping. In particular, the circuits have divided as to whether the language "are to be grouped under this subsection" means that grouping of offenses listed in the first category set out in § 3D1.2(d) is mandatory when: (1) multiple offenses appear anywhere in the list; (2) on the same row in the list; or (3) when a defendant is convicted of multiple counts of the same offense included in the list. Additionally, the court below has suggested the propriety of grouping multiple counts that fall under virtually identical "to be grouped" guidelines, as occurred in this case. The proper application of USSG § 3D1.2(d) affects the sentencings—and thus the liberty interests—of many, many individuals convicted of multiple federal offenses. Because the language of that subsection is ambiguous and has been subjected to varying interpretations by our circuit courts, the need for guidance from this Court is vital.

The United States Sentencing Guidelines allow the district court to group offenses when sentencing a defendant convicted of multiple offenses. USSG § 3D1.2 directs that "[a]ll counts involving substantially the same harm shall be grouped together into a single Group." Section 3D1.2(d) explains that counts involve substantially the same harm when, *inter alia*, the offense level is determined largely on a measure of aggregate harm. Section 3D1.2(d) separates offenses into three categories: (1) offenses that "are to be grouped under this subsection;" (2) offenses which are specifically excluded from the operation of the subsection; and (3) those for which grouping may be appropriate on a case-by-case basis. At issue here is the "to be grouped" category—the mandatory nature of which has caused divergent opinions among the circuits. A number of circuits have rejected the mandatory grouping of all counts falling under guidelines appearing *anywhere* in the "to be grouped" list. *See United States v. Napoli*, 179 F.3d 1, 9 n. 4 (2d Cir. 1999); *United States v. Seligsohn*, 981 F.2d 1418, 1425 (3d Cir. 1993); *United States v. Williams*, 154 F.3d 655, 657 (6th Cir. 1998), *cert. denied*, 525 U.S. 1113 (1999); *United States v. Taylor*, 984 F.2d 298, 303 (9th Cir. 1993); *United States v. Johnson*, 971 F.2d 562, 576 (10th Cir. 1992); *United States v. Harper*, 972 F.2d 321, 322 (11th Cir. 1992). Under that approach, automatic grouping under § 3D1.2(d) for every offense guideline on the "to be grouped" list would detract from the main purpose of § 3D1.2, namely to combine offenses involving closely related counts. *See United States v. Rudolph*, 137 F.3d 173, 185 n. 3 (3d Cir. 1998); *United States v. Harper*, 972 F.2d 321, 322 (11th Cir. 1992). *But see United States v. Myers*, 198 F.3d 160, 165 (5th Cir. 1999), *cert. denied*, 530 U.S. 1220 (2000) (holding that, "[m]oreover, because the substantive offenses fell under both the theft guidelines and the fraud guideline, they were properly grouped under § 3D1.2(d), which states that offenses covered by the theft guideline, § 2B1.1, and the fraud guideline, § 2F1.1, are to be grouped under that subsection.").

The First Circuit adopted the view that multiple counts covered by guidelines appearing in the *same row* of § 3D1.2(d)'s "to be grouped" list should be grouped automatically. In *United States v. Zanghi*, 189 F.3d 71, 85 (1st Cir. 1999), *cert. denied*, 528 U.S. 1097 (2000), the First Circuit recognized that "active debate" existed as to whether it is mandatory to group all offenses covered by guidelines listed in paragraph 2 of § 3D1.2(d)—the "to be grouped" list. The First Circuit reasoned, however, that mandatory grouping of offenses covered by guidelines listed in the *same row* of that paragraph was proper, and not inconsistent with that view. *Id. See also United States v. Emerson*, 128 F.3d 557, 564 n. 1 (7th Cir. 1997) (recognizing that "[t]here is some question whether all of the offense sections listed under § 3D1.2(d) are to be grouped with each other, or if only those sections listed in the same row are to be grouped together.").

Other circuits hold that grouping is automatic for offenses covered by the same guideline when this shared guideline appears in § 3D1.2(d)'s "to be grouped" list. In *United States v. Buenrostro-Torres*, 24 F.3d 1173, 1176 (9th Cir. 1994), the Ninth Circuit opined as to § 3D1.2(d):

> [t]he remainder of the subsection implements this principle by listing the particular guidelines that cover the offenses that are to be grouped, and by providing that offenses covered by unlisted guidelines are to be analyzed on a case-by-case basis. If the offenses at issue are covered by one of the listed guidelines we do not analyze the facts of the particular case.

Id. See also United States v. Tolbert, 306 F.3d 244, 248 (5th Cir. 2002) (holding that § 3D1.2(d) "expressly states that offenses applying guideline 2F1.1 should be grouped").

In its decision below, the Second Circuit expressed some sympathy for this view, noting that it was supported by Application Note 6 to § 3D1.2. Application Note 6 provides that "[c]ounts involving offenses to which different offense guidelines apply are grouped together under subsection (d) if the offenses are of the same general type and otherwise meet the criteria for grouping under this subsection." The court reasoned that the application note implies that grouping is automatic for counts covered by the *same* guideline because it provides a specific approach to take when *different* guidelines on the list are at issue. *United States v. Lenoci*, 377 F.3d 246, 253 (2d Cir. 2004). In considering whether petitioner's two offenses, under USSG § 2C1.1 and USSG § 2C1.7 respectively, should have been grouped, the Second Circuit observed that the harm from those offenses may not be easily aggregated since the harm from one offense revolved around Mayor Ganim's status as an elected official, while the other was determined by the monetary amount paid to Trinkley. *Id.* at 255. Notwithstanding, the Second Circuit acknowledged that had both of petitioner's offenses fallen under the same guideline, they would ordinarily have been grouped. *Id.* The problem recognized by the court was the level of similarity between §§ 2C1.1 and 2C1.7: "[t]he difficulty presented by this challenge is that the relevant guidelines, §§ 2C1.1 and 2C1.7, while not identical, are virtually identical." *Id.* Indeed, this was the exact position argued by petitioner in his appeal. The Second Circuit continued: "[w]e should, therefore, be hesitant to find both: (1) that we must group counts that fall under identical 'to be grouped' guidelines but (2) that we need not group counts that fall under *virtually* identical 'to be grouped' guidelines." *Id.* (emphasis in original).

In sum, as the Second Circuit recognized, the "to be grouped" language of § 3D1.2(d) is ambiguous. *Lenoci*, 377 F.3d at 254. Here, the Second Circuit expressed some support for the position that identical guidelines appearing on the "to be grouped" list should be automatically grouped, and suggested that this approach be extended to multiple counts falling under *virtually* identical offense guidelines appearing on § 3D1.2(d)'s list of offenses "to be grouped." Other circuits, however, have subjected that language to different interpretations. Section 3D1.2(d) is not an obscure sentencing guideline applicable to the exceptional criminal defendant. Rather, the applicability of that grouping guideline is considered by district courts each time a defendant is sentenced who has been convicted of more than one offense. Under those circumstances, and given that nearly every circuit has confronted the issue, the application of USSG § 3D1.2(d) is an important issue warranting review by this Court.

Despite its importance, the Second Circuit did not resolve the issue. As a result, sentencing courts in this circuit are without guidance on applying the "to be grouped" language of § 3D1.2(d). Instead, the court concluded that, even if the district court erred by failing to group petitioner's counts, that error was harmless because the government would be entitled to a two-level increase under USSG § 2C1.1(b)(1) if the counts were grouped. This enhancement would increase petitioner's offense level to 17, the non-grouped level at which he was actually sentenced. In short, the court held that the two-level increase would not violate petitioner's plea agreement. This holding, however, is contrary to prior Second Circuit precedent.

"A sentence imposed pursuant to a plea agreement 'must follow the reasonable understandings and expectations of the defendant with respect to the bargained-for sentence.'" *United States v. Palladino*, 347 F.3d 29, 33 (2d Cir. 2003) (quoting *United States v. Ferrara*, 954 F.2d 103, 105 (2d Cir. 1992)). In *Palladino*, the Second Circuit held that the government breached its plea agreement when it sought a six-point sentencing enhancement based on conduct known to the government at the time the plea agreement was made—but not included in the government's estimated offense level in the plea agreement. Although the *Palladino* agreement stated that it was based on information known to the government at the time of the plea, in concluding that the government breached the plea agreement the *Palladino* court held the government's actions violated not only the language of that agreement, but the "spirit of the plea agreement." In so holding, the court focused on the defendant's reasonable expectations in view of the plea agreement negotiations, and concluded that a defendant may logically "... believe that the estimate, and the Government's stance at the sentencing hearing, would not be altered in the absence of new information ...." *Id.* at 34.

In petitioner's case, it is undisputed that the government knew—from the beginning—that multiple bribes to multiple people were involved. In its plea negotiations with petitioner, which petitioner conducted in good faith, the government never raised that issue as an enhancement to petitioner's sentence. The government certainly cannot contend this was new information received on the eve of sentencing—when petitioner first learned the government's position. As was the defendant in *Palladino*, petitioner was entitled to a reasonable expectation that the government would not press the district court for an enhanced offense level in the absence of new information, an action that contravened its representations in the plea agreement.

The Second Circuit's holding that the government did not violate the plea agreement by presenting an argument for a two-level upward adjustment is inconsistent with its holding in *Palladino*, namely that the government violated at least the spirit of the plea agreement by pressing for a later enhancement based on knowledge available at the time the plea agreement was completed. Because the Second Circuit's decision in this case conflicts with its own precedent, this Court's intervention is warranted.

Further, this case implicates this Court's recent decision in *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531, 159 L.Ed.2d. 403 (2004). In deciding whether petitioner's bribery and theft of honest services mail fraud offense should be grouped under USSG § 3D1.2(d), the district court was required to determine whether the counts involved substantially the same harm, and specifically whether the offense levels of those counts were determined largely on a measure of aggregate harm. In making its grouping determination, the district court concluded that petitioner's bribery and mail fraud offenses were driven by different purposes such that the "aggregate value" necessary for grouping under USSG § 3D1.2 was absent. (Pet. App. 37a - 38a). In making such a finding, the district court necessarily relied on facts surrounding petitioner's offenses, including those facts pertaining to the extent and value of the construction projects involved. Because petitioner only admitted to some of those relevant facts and, indeed, disputed others, the district court served as a fact finder with regard to that information.

In *Blakely*, this Court held that the Sixth Amendment barred a sentencing court from increasing a defendant's sentence above the statutory maximum based on facts that were neither found by a jury, nor admitted by the defendant. As the Second Circuit observed in *United States v. Penaranda*, 375 F.3d 238, 244 (2d Cir. 2004), portions of the majority opinion in *Blakely* suggest that the decision applies to the Federal Sentencing Guidelines, and that a district judge may not find facts that determine which Guidelines range is applicable. *See Blakely*, ___ U.S. ___, 124 S.Ct. at 2537 (stating that the applicable "statutory maximum" is the *maximum sentence* a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant). In determining petitioner's sentencing range, the district court necessarily found facts regarding petitioner's offenses—including those relating to the extent and value of the construction projects involved. Because petitioner admitted to only some of those relevant facts and challenged others, under this Court's holding in *Blakely* the district court impermissibly invaded petitioner's Sixth Amendment right to have those facts found by a jury.

This Court decided *Blakely* after oral argument in the Second Circuit. Consequently, the *Blakely* issue was not squarely before the Second Circuit. Notwithstanding, *Blakely*'s potential impact was noted in the decision of the court below. *See United States v. Lenoci*, 377 F.3d 246, 248

n. 1 (2d Cir. 2004). In fact, although the Second Circuit noted no "immediately apparent" *Blakely* issue, it was concerned enough about *Blakely*'s applicability to stay issuance of the mandate until further direction of the panel, citing *United States v. Penaranda*, 375 F.3d 238 (2d Cir. 2004). Under those circumstances, the *Blakely* issue has been properly preserved for decision by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Ira B. Grudberg
(Counsel of Record)
JACOBS, GRUDBERG, BELT & DOW, P.C.
350 Orange Street
New Haven, Connecticut 06511
203-772-3100

October 21, 2004

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2003

(Argued: April 2, 2004 Decided: July 28, 2004)

Docket No. 03-1481

UNITED STATES OF AMERICA,

Appellee,

—v.—

ALFRED LENOCI, SR.,

Defendant-Appellant.

Before:

JACOBS, STRAUB, and B.D. PARKER,
Circuit Judges.

Appeal from an order of the United States District Court for the District of Connecticut (Janet Bond Arterton, *Judge*) convicting the defendant, after a guilty plea, of one count of bribery in violation of 18 U.S.C. § 666(a)(2) and one count of executing a scheme to deprive another of the intangible right of honest services in violation of 18 U.S.C. §§ 1341 and 1346. On appeal, the defendant contends that the District Court erred by failing to group his two counts of conviction under § 3D1.2(c) or § 3D1.2(d) of the United States Sentencing Guidelines. We find meritless the defendant's claim that his counts should have been grouped under § 3D1.2(c). As for the defendant's claim that the District Court erroneously failed to group his convictions under § 3D1.2(d), we decide the issue on the ground of harmless error. We write, however, to describe some of the ambiguities of § 3D1.2(d) that would have made resolution of the defendant's claim difficult had his challenge demonstrated harmful error. We also direct the Clerk of the Court to forward a certified copy of this opinion to the Chairperson and Chief Counsel of the United States Sentencing Commission.

Affirmed.

IRA B. GRUDBERG, Jacobs, Grudberg, Belt & Dow, PC, New Haven, Connecticut (Trisha Morris Porto, of counsel), *for Defendant-Appellant.*

RONALD S. APTER, Assistant United States Attorney for the District of Connecticut, Hartford, Connecticut (Jeffrey A. Meyer, Assistant United States Attorney, of counsel; Kevin J. O'Connor, United States Attorney for the District of Connecticut, on the brief), *for Appellee.*

STRAUB, *Circuit Judge*:

Defendant-Appellant Alfred Lenoci, Sr., ("Lenoci") appeals from an order of the United States District Court for the District of Connecticut (Janet Bond Arterton, Judge) convicting the defendant, after a guilty plea, of one count of bribery in violation of 18 U.S.C. § 666(a)(2) and one count of executing a scheme to deprive another of the intangible right of honest services in violation of 18 U.S.C. §§ 1341 and 1346. On appeal, Lenoci contends that the District Court erred by failing to group his two counts of conviction under § 3D1.2(c) or § 3D1.2(d) of the United States Sentencing Guidelines Manual ("U.S.S.G."). We find meritless the defendant's claim that his counts should have been grouped under § 3D1.2(c). As for his claim that the District Court erroneously failed to group his convictions under § 3D1.2(d), we decide the issue on the ground of harmless error. We write, however, to describe some of the ambiguities of § 3D1.2(d) that would have made resolution of the defendant's claim difficult had his challenge demonstrated harmful error. We also direct the Clerk of the Court to forward a certified copy of this opinion to the Chairperson and Chief Counsel of the United States Sentencing Commission.[1]

---

[1] Oral argument was heard in this case on April 2, 2004, nearly three months before the Supreme Court decided *Blakely v. Washington*, __ U.S. __, 2004 WL 1402697 (June 24, 2004). While we bring the grouping issues raised in this case to the attention of the United States Sentencing Commission, we recognize that in light of *Blakely*, the Commission may be presented with more pressing matters to which it must attend. In this case, the parties have not raised any *Blakely* issues, nor do we believe that any such issues are immediately apparent. However, out of an abundance of caution, we stay the issuance of the mandate in this case until further direction from the panel. *See, e.g.*, *United States v. Penaranda*, Nos. 03-1055(L), 03-1062(L), 2004 WL 1551369 (2d Cir. July 12, 2004) (in banc).

BACKGROUND

The facts of this case are largely derived from the defendant's presentence report. According to his presentence report, Lenoci, along with his son and brother, sought to become the preferred real estate developer for certain tracts of land in Bridgeport, Connecticut. One of these was a seventeen-acre parcel of land at the former site of the Father Panik Village low-income housing project. To further his development plans at the site, Lenoci sought the support and approval of Bridgeport's then-mayor, Joseph Ganim. Lenoci agreed to pay for a variety of construction projects for the mayor's personal residence. In exchange, Ganim used his official position to advance Lenoci's efforts to develop the land; in particular, Ganim wrote a letter in August 1999 to the Bridgeport Housing Authority to support Lenoci's request to enter into a long term lease for the site.

Similarly, in late 1999, Lenoci sought to develop a fifty-acre parcel of land on the Bridgeport waterfront known as Steel Point. To secure the rights for development, Lenoci agreed to pay the mayor's intermediary $1 for every square foot of commercial space in Bridgeport developed in the future by Lenoci's company, including any development at the Steel Point site. At a later meeting, Lenoci also agreed to raise funds for the mayor's anticipated campaign for governor, in return for Ganim's support for the venture at Steel Point.

With respect to the Father Panik Village site, Lenoci also sought state development funds to subsidize the proposed facility. From June 1999 to October 2000, Lenoci provided Mark Trinkley, a senior development manager at the State of Connecticut's Department of Economic and

Community Development, with approximately $35,000 worth of landscaping services, home improvements, and other personal benefits. These expenditures were made in exchange for Trinkley's recommendation that $6.5 million in state development funds be directed to Lenoci's company.

On October 19, 2001, Lenoci waived his right to a grand jury indictment and pled guilty to a two-count information arising from his attempts to illegally advance real estate development ventures in Bridgeport. In Count One, the defendant was charged under 18 U.S.C. § 666 with bribing Joseph Ganim. In Count Two, Lenoci was charged under 18 U.S.C. §§ 1341 and 1346 with using the United States mails to execute a scheme to deprive the public of the honest services of Mark Trinkley.

Pursuant to a written plea agreement, Lenoci and the government made several stipulations concerning their view as to how Lenoci's sentence should be calculated under the November 2000 sentencing guidelines. The parties agreed that the offense level for Count One should be determined under U.S.S.G. § 2C1.1, entitled "Offering, Giving, Soliciting, or Receiving a Bribe; Extortion under Color of Official Right." Under that guideline, the parties agreed to a base offense level of 10 under § 2C1.1(a), plus an eight-level enhancement under § 2C1.1(b)(2)(B) because "the offense involved a payment for the purpose of influencing an elected official or any official holding a high-level decision-making or sensitive position." Thus, the parties calculated an offense level of 18 under Count One.

Similarly, the parties agreed that the offense level for Count Two should be determined under U.S.S.G. § 2C1.7, which applies to "Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions." Under that guideline, the parties agreed to a base offense level of 10 under § 2C1.7(a), plus a four-level enhancement under § 2C1.7(b)(1)(A) based upon the parties' stipulation that the fraud concerning Mark Trinkley was valued at $35,000. *See also* U.S.S.G. § 2F1.1(b)(1)(E) (2000). Thus, the parties calculated an offense level of 14 under Count Two.

Importantly, however, the plea agreement did not stipulate whether Counts One and Two should be "grouped." The complex grouping provisions in the guidelines describe the calculation of a defendant's offense level in cases, like Lenoci's, which involve multiple counts of conviction. *See* U.S.S.G. §§ 3D1.1 to 3D1.5. The defendant argued that his two counts involved substantially the same harm and, therefore, should have been grouped under § 3D1.2(c) or § 3D1.2(d). The defendant contends that such a grouping would have led to a combined offense level of 18. With a three-level reduction for acceptance of responsibility, his adjusted offense level would have been 15.

By contrast, the government argued that Lenoci's counts involved distinct transactions and victims, such that grouping was inappropriate. Under the government's analysis, if the offenses were not grouped, Lenoci would have a combined offense level of 20, which, subject to the three-level reduction for acceptance of responsibility, would have resulted in an adjusted offense level of 17. The day before sentencing, the defendant was made aware of an alternative argument proposed by the government. The government stated that even if the counts were grouped as Lenoci argues they should be, the court should then apply a two-level upward adjustment under § 2C1.1(b)(1), which states that "[i]f the offense involved more than one bribe or extortion, increase by 2 levels." With such an adjustment, the government argued, Lenoci's adjusted offense level still would have been 17. Thus, under the government's view, Lenoci's offense level would have been the same regardless of the court's resolution of the § 3D1.2(d) grouping issue, so that any error made by the District Court was harmless.

The Probation Office took the view that the offenses should be grouped under § 3D1.2(d) but concurred with the government's alternative calculation, finding that the two-level upward adjustment is appropriate. The defendant took issue with both the Probation Office's recommendation and the government's alternative calculation, claiming that the two-level upward adjustment was not consistent with the parties' plea agreement.

At Lenoci's July 22, 2003 sentencing hearing, the District Court declined to group the two counts. The court determined that the two counts did not involve the same aggregate harm:

> Count One is driven by the fact of payment to influence an elected official [while] Count Two is driven by the value of the benefits or loss, [such] that you don't have the kind of aggregate value that is a predicate for this concept of grouping. . . . [A]t the bottom line it is an endeavor to buy the influence of public officials, one is elected, one is not elected, they're two different programs, and the difference of officials, schemes, the official[s'] status, seems to me to fall outside what is contemplated to be achieved by the grouping.

Thus, starting with the combined offense level of 20, the court applied a three-level reduction for acceptance of responsibility, producing an adjusted offense level of 17. Having decided not to group the counts, the court did not reach the government's alternative argument that a two-level upward adjustment under § 2C1.1(b)(1) would have applied in any event.

The District Court then granted the government's motion for a downward departure under § 5K1.1 based upon Lenoci's cooperation with the government in a large-scale investigation into public corruption in Bridgeport. Had the court not applied the downward departure, Lenoci would have been given a sentence in the range of 24-30 months of incarceration based on his adjusted offense level of 17. However, because of the downward departure, Lenoci's sentence was not rigidly dictated by the court's calculation of Lenoci's adjusted offense level. Rather, having considered Lenoci's adjusted offense level in conjunction with the government's § 5K1.1 motion, the court exercised its discretion to principally sentence Lenoci to a term of imprisonment of 12 months and 1 day on each count, to be served concurrently.[2] Lenoci filed a timely notice of appeal on August 5, 2003. On August 26, 2003, the District Court granted Lenoci's request for continuation of release on bond pending the outcome of this appeal.

---

[2] Because the court imposed a sentence that is not dictated by the sentencing guidelines, it is possible that the court would have imposed the same ultimate sentence, regardless of whether the court computed an adjusted offense level of 17 (as the government contends) or 15 (as Lenoci contends). When asked whether or not the court would have imposed the same ultimate sentence, however, the court stated that it would be "inappropriate at this juncture to conclude that a reimposed sentence would definitively remain unchanged." Thus, we cannot and do not avoid addressing Lenoci's appeal because of the court's downward departure. *Cf. United States v. Shuster,* 331 F.3d 294, 296 (2d Cir. 2003) ("[G]uideline disputes that would not have affected the ultimate sentence need not be adjudicated on appeal."), *cert. denied,* 124 S. Ct. 1039 (2004).

DISCUSSION

When examining district court determinations as to the sentencing guidelines, we review factual findings for clear error and legal interpretations *de novo. See United States v. Gordon,* 291 F.3d 181, 186 (2d Cir. 2002), *cert. denied,* 537 U.S. 1114 (2003); *United States v. Carboni,* 204 F.3d 39, 46 (2d Cir. 2000). When applying the guidelines to the facts of this case, we give "due deference" to the district court. 18 U.S.C. § 3742(e).

The key grouping provision for our purposes is subsection (d) of U.S.S.G. § 3D1.2, entitled "Groups of Closely Related Counts." It provides as follows:

> *§ 3D1.2. Groups of Closely Related Counts*
>
> All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:
>
> . . . .
>
> (d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are to be grouped under this subsection:

§§ 2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1;
§§ 2C1.1, 2C1.2, 2C1.7, 2C1.8;
§§ 2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;
§§ 2E4.1, 2E5.1;
§§ 2G2.2, 2G2.4;
§ 2K2.1;
§§ 2L1.1, 2L2.1;
§ 2N3.1;
§ 2Q2.1;
§ 2R1.1;
§§ 2S1.1, 2S1.3;
§§ 2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1.

Specifically excluded from the operation of this subsection are:

all offenses in Chapter Two, Part A;

§§ 2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3;
§ 2C1.5;
§§ 2D2.1, 2D2.2, 2D2.3;
§§ 2E1.3, 2E1.4, 2E2.1;
§§ 2G1.1, 2G2.1;
§§ 2H1.1, 2H2.1, 2H4.1;
§§ 2L2.2, 2L2.5;
§§ 2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.9;
§§ 2P1.1, 2P1.2, 2P1.3.

For multiple counts of offenses that are not listed, grouping under this subsection may or may not be

> appropriate; a case-by-case determination must be made based upon the facts of the case and the applicable guidelines (including specific offense characteristics and other adjustments) used to determine the offense level.
>
> Exclusion of an offense from grouping under this subsection does not necessarily preclude grouping under another subsection.

U.S.S.G. § 3D1.2.[3]

The guideline begins by stating the standard which governs grouping under this section. Namely, "[a]ll counts involving substantially the same harm shall be grouped together . . . ." It goes on to explain what this means in subsections (a), (b), (c), and (d). Most important for our purposes, subsection (d) provides certain circumstances where counts are deemed to involve substantially the same harm. It lists several guidelines and, using seemingly mandatory language, provides that offenses covered by those guidelines are "to be grouped." It then goes on to provide another list of guidelines which are "[s]pecifically excluded from the operation of this subsection." Afterward, it states that offenses which fall under guidelines that are not listed should be examined on a "case-by-case" basis.

---

[3] We show here the current November 2003 version of the guideline, even though the parties' plea agreement contemplated use of the November 2000 version. The changes to the guideline during this period, however, are not pertinent to Lenoci's offenses.

I. THE “TO BE GROUPED” LANGUAGE OF U.S.S.G. § 3D1.2(d)

A critical preliminary issue presented by U.S.S.G. § 3D1.2(d) is the meaning of its seemingly mandatory provision that “[o]ffenses covered by the following guidelines *are to be grouped.*” U.S.S.G. § 3D1.2(d) (emphasis added). The list of offenses under subsection (d) which are “to be grouped” is composed of rows of guideline sections from Chapter 2 of the United States Sentencing Guidelines Manual. Individual guidelines that fall under the same “part” of Chapter 2 all contain the same alphabetical letter, appear on the same line, and are separated from each other by commas. Thus, for example, all of the guidelines in the second row of the “to be grouped” list are from “part C” of Chapter 2, which addresses offenses that involve public officials. Each row is separated from the other rows by semi-colons. Notably for our purposes, §§ 2C1.1 and 2C1.7, the guidelines covering Lenoci’s offenses, both appear in the second line in the listing of “to be grouped” offenses. Thus, a question is raised as to whether, contrary to the District Court’s determination, the guidelines provide that Lenoci’s offenses must be grouped.

Unfortunately, the guidelines are not entirely clear as to what is “to be grouped” under § 3D1.2(d). Had we not the benefit of interpretive case law, the provision would suggest at least three possible interpretations. We could:

> (1) group all counts that fall under guidelines which appear anywhere in the “to be grouped” list;
>
> (2) group all counts that fall under guidelines that appear on the same line of the list; or

(3) group all counts that fall under a particular guideline in the list (e.g., all counts under § 2C1.1 are to be grouped together).

The first interpretation, namely, that we are to group all offenses in the "to be grouped" list, has been rejected by most courts that have considered the issue and also poses practical difficulties of aggregation. In our Circuit, this approach is likely precluded by our decision in *United States v. Napoli,* 179 F.3d 1 (2d Cir. 1999), *cert. denied,* 528 U.S. 1162 (2000). *Napoli* addressed whether or not fraud and money laundering counts should have been grouped under § 3D1.2(d). At the time, the applicable guidelines, § 2F1.1 (fraud) and § 2S1.1 (money laundering), both appeared in the § 3D1.2(d) list of offenses which "are to be grouped under this subsection." In a footnote in that case, we stated that we "reject the broad view that money laundering and fraud counts can be grouped under subsection (d) simply because they both appear on its list of counts 'to be grouped.'" *Id.* at 9 n.4. We pointed out that the list of counts "to be grouped" under § 3D1.2(d) contains offenses, such as drug dealing and fraud, that measure the harm they seek to punish in different ways (e.g., drug quantity versus amount of money). "Because the guidelines for each of these offenses measure harm differently, it would be impossible to use either guideline to determine an offense level based on the 'total' or 'aggregate' harm from both—as is required when counts are grouped under subsection (d)." *Id.* Therefore, we concluded that the appearance of both guidelines on the "to be grouped" list was not conclusive.

Furthermore, this first interpretation is contrary to case law in many other circuits where grouping is not automatic simply because each count falls under a guideline in the "to be grouped" list. *See United States v. Williams,* 154 F.3d 655, 657 (6th Cir. 1998), *cert. denied,* 525 U.S. 1113 (1999); *United States v. Taylor,* 984 F.2d 298, 303 (9th Cir. 1993); *United States v. Seligsohn,* 981 F.2d 1418, 1425 (3d Cir. 1992), *cert. denied,* 513 U.S. 1119 (1995); *United States v. Harper,* 972 F.2d 321, 322 (11th Cir. 1992); *United States v. Johnson,* 971 F.2d 562, 576 (10th Cir. 1992). In addition, in several cases in this Circuit where we eventually concluded that grouping is appropriate for counts that fall under different guidelines, we first engaged in an analysis of whether the offenses were of the same general type and were otherwise suitable for grouping. *See Gordon,* 291 F.3d at 192-93 (2d Cir. 2002); *United States v. Petrillo,* 237 F.3d 119, 124-25 (2d Cir. 2000); *United States v. Fitzgerald,* 232 F.3d 315, 319-20 (2d Cir. 2000). If appearance on the list of counts to be grouped was conclusive and grouping automatic, the careful analysis in those cases would have been unnecessary.

Lastly, this interpretation is not supported by Application Note 6 to § 3D1.2.[4] The application note states that "[c]ounts involving offenses to which different offense guidelines apply are grouped together under subsection (d) if the offenses are of the same general type and otherwise meet the criteria for grouping under this subsection." This strongly suggests that the grouping of counts that fall under different guidelines is not automatic merely because the counts are covered by guidelines in the "to be grouped" list.

---

[4] *See Stinson v. United States,* 508 U.S. 36, 45 (1993) (stating that "the guidelines are the equivalent of legislative rules adopted by federal agencies" and "provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation") (internal quotation marks omitted).

The second interpretation would automatically group counts that fall under guidelines that appear on the same row of the list. This makes intuitive sense because the offenses under guidelines listed on the same row are generally similar, having been selected for inclusion in the same part of Chapter 2. In addition, the presentation of the list, which separates guidelines on the same row with commas and uses semicolons to set these lines off from the rest, might suggest that this clustering was intentional. Furthermore, guidelines on the same row generally measure harm in the same way, making it easier to aggregate harm for counts under guidelines on the same line.

At least two circuit courts have been sympathetic to the view that courts should automatically group counts covered by guidelines which appear on the same row of the "to be grouped" list. *See United States v. Zanghi,* 189 F.3d 71, 85 (1st Cir. 1999) (holding that grouping is automatic for counts under guidelines § 2S1.1 and § 2S1.2, and while finding uncertainty in the case law as to "whether it is imperative to group all offenses covered by guidelines listed in paragraph 2 of § 3D1.2(d)," noting that such cases do not address grouping as to "offenses covered by guidelines listed *in the same row* of that paragraph") (emphasis in original), *cert. denied,* 528 U.S. 1097 (2000); *United States v. Emerson,* 128 F.3d 557, 564 n.1 (7th Cir. 1997) (stating that "[t]here is some question whether all of the offense sections listed under § 3D1.2(d) are to be grouped with each other, or if only those sections listed in the same row are to be grouped together").

On the other hand, there is little in the language of the sentencing guidelines to support an approach under which grouping is automatic for counts in the same row but not for those on different rows. *Napoli,* at a minimum, provides no support for this line-by-line approach. Although the offenses in *Napoli* involved guidelines listed on different rows, it did not distinguish between offenses under different guidelines on different rows and offenses under different guidelines on the same row. Furthermore, Application Note 6 to § 3D1.2 draws no distinction as to grouping procedures on a line-by-line basis; rather, it seems to group offenses under different guidelines the same way regardless of whether or not they are listed on the same line. In addition, § 3D1.2(d) lists certain guidelines that are "[s]pecifically excluded from the operation of this subsection." These listings have the same format as those which are "to be grouped." This suggests that the physical layout of the guidelines on the page is largely just a matter of visual clarity and alphabetical ordering, without legal significance. Given that some rows contain only one guideline, it is particularly difficult to find that the placement of certain guidelines on the same row is meant to signify a particular relationship among those guidelines. In short, other than the guideline's aesthetic presentation, there is little support in this Circuit for the view that the placement of certain guidelines on the same line has legal significance.

Under a third approach, only offenses covered by the same guideline must be grouped when that common guideline appears in the "to be grouped" list. Thus, the guideline language specifying that "[o]ffenses covered by the following guidelines are to be grouped under this subsection" is read as applying to counts under individual guidelines, but not across guidelines. If, for example, both of Lenoci's offenses were covered under § 2C1.1, a "to be grouped" guideline, then, following this interpretation, both offenses would have to be grouped.

This third approach is consistent with Application Note 6 to § 3D1.2, which states that "[c]ounts involving offenses to which *different* offense guidelines apply are grouped together under subsection (d) if the offenses are of the same general type and otherwise meet the criteria for grouping under this subsection." (emphasis added). By specifying a specific approach to take when different guidelines on the list are involved, the application note implies that grouping is automatic for counts covered by the same guideline. *See United States v. Buenrostro-Torres,* 24 F.3d 1173, 1175-76 (9th Cir. 1994) ("If the offenses at issue are covered by one of the listed guidelines we do not analyze the facts of the particular case. Here, the offenses in Counts One through Three are covered by § 2F1.1; Congress has determined that such offenses are categorically groupable under § 3D1.2(d)."). Yet, as discussed further in the next section, the view that we must group counts that fall under the same "to be grouped" guideline has not met with universal agreement.

The preceding discussion shows that the plain language of the "to be grouped" provision in § 3D1.2(d) is ambiguous. While the application notes and interpretive case law may clarify that language and perhaps foreclose certain interpretations, the range of interpretations available has surely limited the value of the "to be grouped" language, which was likely intended to offer straightforward guidance as to grouping in at least certain instances.

We also note that the three interpretations described here are not exhaustive, and we raise a question as to whether mandatory grouping, under any of these interpretations, ought to be limited based on whether the relevant offense level calculations primarily involve some measure of harm that *can* be aggregated. For as we discuss in the next section, in considering whether Lenoci's offenses should be grouped, it is not clear how much weight we ought to give to the fact that his harmful conduct cannot easily be aggregated under the guidelines.

II. AGGREGATION OF THE HARM FROM DEFENDANT'S CONDUCT

If the plain meaning of the "to be grouped" language failed to resolve the grouping question presented here, we would turn next to the question of whether the counts here ought nevertheless be grouped under the more general provisions of § 3D1.2(d). The government argues, *inter alia,* that grouping is inappropriate here because the offense levels associated with each count are not "determined largely on the basis of the total amount of harm or loss . . . or some other measure of aggregate harm." U.S.S.G. § 3D1.2(d). The offense level for Count One was determined by the eight-level upward adjustment triggered by Ganim's status as an elected official. *See* U.S.S.G. § 2C1.1(b)(2)(B). By contrast, the offense level for Count Two was determined by the monetary amount paid to Trinkley. *See* U.S.S.G. §§ 2C1.7(b)(1)(A), 2F1.1(b)(1)(E) (2000). As the government correctly notes, the harm from these offenses cannot easily be aggregated were they placed into the same group.

The difficulty presented by this challenge is that the relevant guidelines, §§ 2C1.1 and 2C1.7, while not identical, are virtually identical. In fact, had both of Lenoci's counts been deemed to fall under the same guideline, then under any of the three interpretations of the "to be grouped" language discussed in the previous section, we would ordinarily have grouped them, despite the difficulties in aggregation noted by the government. If we were compelled by the guidelines to group both of Lenoci's offenses had they fallen under the same guideline, then the government's concern about aggregation is diminished somewhat. Furthermore, one of the purposes of the grouping provisions is to reduce the importance of the charging decision. *See* U.S.S.G., ch. 3 pt. D, intro. cmt. ¶ 4 (stating that the grouping rules serve "to limit the significance of the formal charging decision and to prevent multiple punishment for substantially identical offense conduct") (quoted in *United States v. Ahmad,* 202 F.3d 588, 591 (2d Cir. 2000)). We should, therefore, be hesitant to find both: (1) that we must group counts that fall under identical "to be grouped" guidelines but (2) that we need not group counts that fall under *virtually* identical "to be grouped" guidelines.

There is, however, some precedent suggesting that grouping is not automatic even for counts which fall under identical "to be grouped" guidelines. The government cites *United States v. McElroy,* 910 F.2d 1016, 1027 (2d Cir. 1990), where we held that the District Court did not err when it declined to group counts of paying bribes with counts of receiving bribes, even though they appear to have fallen under the same "to be grouped" guideline. In that case, we did not require grouping because the counts "did not involve either the same property or the same victim." *Id.* Based on *McElroy,* it would seem that grouping is not mandatory even for counts under the same "to be grouped" guideline.

Even if *McElroy* was a case in which we failed to group counts in the same "to be grouped" guideline, however, we must read it in light of subsequent case law. For example, in *Napoli,* we explicitly disapproved of the same-victim requirement which led the *McElroy* court not to group counts that fell under the same "to be grouped" guideline. *See Napoli,* 179 F.3d at 8-9. Furthermore, in *United States v. Gelzer,* 50 F.3d 1133, 1145 (2d Cir. 1995), we held that it was clear error not to have grouped two firearms counts, both of which fell under § 2K2.1, a "to be grouped" guideline. In that case, our analysis turned, perhaps exclusively, on the fact that the relevant guideline appeared in the "to be grouped" list. The case at bar does not present a proper occasion to resolve these issues, however, because we find, as discussed in Section IV, *infra,* that if the District Court did err as to grouping under § 3D1.2(d), such error was harmless.

III. GROUPING UNDER § 3D1.2(c)

The defendant argues that if his counts are not grouped under § 3D1.2(d), they should be grouped under § 3D1.2(c). Under § 3D1.2(c), counts involve substantially the same harm and should be grouped "[w]hen one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts." U.S.S.G. § 3D1.2(c). This provision is intended to prevent "double counting" of "closely related" offense behavior. U.S.S.G. § 3D1.2(c), cmt. n.5. According to Lenoci, his conviction under Count Two for honest services mail fraud requires that the public be deprived of the intangible right to the honest services of a public official. Similarly, he notes, the eight-level upward adjustment applied to his bribery offense charged in Count One because it "involved a payment for the purpose of influencing an elected official or any official holding a high-level decision-making or sensitive position." U.S.S.G. § 2C1.1(b)(2)(B). Thus, he claims that the offense conduct in both Counts One and Two involves the influencing of public officials.

We find Lenoci's § 3D1.2(c) grouping argument to be without merit. Though both counts of conviction contemplate corruption of a public official, the offense conduct in each count against Lenoci involved different public officials. There was, therefore, no double counting that would justify application of the § 3D1.2(c) grouping provision. *Cf. United States v. Leung,* 360 F.3d 62, 69 (2d Cir. 2004) (finding error where the District Court failed to group an obstruction of justice count with a passport fraud count that included an obstruction enhancement where the enhancement was "based on the same obstructive behavior").

IV. HARMLESS ERROR

We need not resolve Lenoci's grouping challenge, however, because we find that even if the District Court erroneously failed to group his counts of conviction under § 3D1.2(d), any such error was harmless. *See United States v. Tropiano,* 50 F.3d 157, 162 (2d Cir. 1995) ("[W]e will vacate a sentence and remand for resentencing because of a misapplication of the Guidelines only if we determine that the error was not harmless."); *United States v. Thorn,* 317 F.3d 107, 126 (2d Cir.), *cert. denied,* 538

U.S. 1064 (2003). Even if the court should have grouped the two counts in this case, Lenoci's offense level would have been the same. *See United States v. Sacco,* 899 F.2d 149, 151 (2d Cir. 1990) (holding that even where the government conceded that the court erroneously failed to group two counts, the error was harmless because "the court's grouping error made no difference in the sentence"). When Lenoci's counts were not grouped, his combined offense level was calculated by the District Court as 17. Lenoci argues that his offense level would have been 15 if the counts were grouped. We find, however, that even if the counts were grouped, his total offense level would still have been 17; hence, any error was harmless.

Were the two counts combined into one group under § 3D1.2(d), as Lenoci suggests they should have been, the court would have applied § 3D1.3(b). Under that provision, "[w]hen the counts involve offenses of the same general type to which different guidelines apply," as the parties agree is the case here, we "apply the offense guideline that produces the highest offense level." We determine the applicability of "specific offense characteristics or adjustments . . . based upon the combined offense behavior taken as a whole." U.S.S.G. § 3D1.3, cmt. n.3.

Under this analysis, Lenoci's offense level under the § 2C1.1 bribery guideline would have been 20. Eight levels would have been added to his base offense level of 10 because the offense involved a payment for the purpose of influencing an elected official. *See* U.S.S.G. § 2C1.1(b)(2)(B). Importantly, however, we would add an additional two levels because when the conduct is combined into one group, it triggers the applicability of a two-level upward adjustment under § 2C1.1(b)(1). *See* U.S.S.G. § 2C1.1(b)(1) ("If the offense involved more than one bribe or extortion, increase by 2 levels."). Having calculated an offense level of 20 under § 2C1.1, the court would then apply a three-level reduction for acceptance of responsibility, making Lenoci's total offense level 17, the same level arrived at by the District Court when the counts were not grouped.

Lenoci does not contest this analysis, as such, but argues instead that the government is precluded by the plea agreement from arguing for the two-level upward adjustment under § 2C1.1(b)(1). The defendant states that, during plea bargaining, both parties were aware that multiple bribes were involved as to both Ganim and Trinkley, such that the government could have sought the upward adjustment regardless of the grouping decision. Yet, the plea agreement made no mention of any two-level upward adjustment despite the parties' mutual knowledge that several bribes were involved. Furthermore, Lenoci claims that he was not even aware of the government's intention to raise the issue of the two-level enhancement until the day before sentencing. Lenoci argues that the plea agreement must be interpreted according to his reasonable expectation that such an enhancement would not be sought by the government. Thus, under the defendant's analysis, the failure to group the counts was harmful error because, had the court been persuaded by Lenoci's grouping argument, the government would have been precluded from arguing for the multiple bribe enhancement. Lenoci concludes that, if he is right as to grouping, the court would have respected the spirit of his plea agreement, yielding a total offense level of 15.[5]

---

[5] If the court had come to the conclusion that the multiple bribe enhancement should be applied either on its own or at the suggestion of the Probation Office, such a determination would have been correct and would not have violated the plea agreement. The plea agreement specif-

"We review interpretations of plea agreements *de novo* and in accordance with principles of contract law." *United States v. Riera,* 298 F.3d 128, 133 (2d Cir. 2002) (citing *United States v. Padilla,* 186 F.3d 136, 139 (2d Cir. 1999)). "A sentence imposed pursuant to a plea agreement must follow the reasonable understandings and expectations of the defendant with respect to the bargained-for sentence." *United States v. Palladino,* 347 F.3d 29, 33 (2d Cir. 2003) (internal quotation marks omitted). "Because the government ordinarily has certain awesome advantages in bargaining power, any ambiguities in the agreement must be resolved in favor of the defendant." *Riera,* 298 F.3d at 133 (internal quotation marks omitted); *Padilla,* 186 F.3d at 140.

We find that the plea agreement did not prevent the government from arguing for a two-level upward adjustment under § 2C1.1(b)(1). The plea agreement states, "[t]he defendant acknowledges that no other promises, agreements, or conditions have been entered into other than those set forth in this plea agreement, and none will be entered into unless set forth in writing by all the parties." Lenoci cannot cite any provision in the plea agreement which precludes the government from arguing for the two-level upward adjustment, for there is no such provision. The fact that the government did not seek the multiple bribe enhancement in one context does not preclude it from doing so in another, absent some agreement on the issue. "[W]here—as here—the Government incorporates

---

ically states that it is not binding on the court or the Probation Office and that the defendant does not have the "right to withdraw his guilty plea if his sentence or the Guideline application is other than he anticipated."

into the plea agreement an integration clause expressly disavowing the existence of any understandings other than those set forth in the plea agreement, a defendant may not rely on a purported implicit understanding in order to demonstrate that the Government is in breach." *In re Altro,* 180 F.3d 372, 376 (2d Cir. 1999).

Furthermore, the plea agreement states that "[i]n the event the Probation office or the Court contemplates any sentencing calculations different from those stipulated by the parties, the parties reserve the right to respond to any inquiries and make appropriate legal arguments regarding the proposed alternate calculations." Although the government was apparently the first party to propose the two-level enhancement for multiple bribes, it did so in response to the recommendation in the presentence report that the counts be grouped. Because the grouping of counts in the plea agreement was not an issue stipulated to by the parties, the government did not violate the plea agreement by presenting an argument in the alternative for a two-level upward adjustment.

Lenoci could anticipate that the general issue of grouping would be presented to the District Court because his plea agreement and allocution acknowledge multiple instances of criminal conduct. Indeed, Lenoci does not argue that the government was prohibited from raising *some* grouping argument, only that it could not argue for the multiple bribe enhancement. We find that the argument for the two-level multiple bribe enhancement was an extension of the government's argument concerning the propriety of grouping and the methods by which grouping should or should not be accomplished. Lenoci likely realized and, in any event, should have realized that the government would present a grouping argument, and the multiple bribe enhancement is simply a part of that argument.

Where, as here, the plea agreement stipulates that there were multiple bribes, it is obvious that the enhancement would have been applicable. Thus, we conclude that, regardless of the District Court's decision as to grouping under § 3D1.2(d), Lenoci's sentence would have been the same. We, therefore, find that if there had been any error as to the § 3D1.2(d) grouping decision, it was harmless.

CONCLUSION

For the reasons stated, we hereby AFFIRM the judgment of the District Court and direct the Clerk of the Court to forward a certified copy of this opinion to the Chairperson and Chief Counsel of the United States Sentencing Commission. Furthermore, in light of *Blakely v. Washington*, ___ U.S. ___, 2004 WL 1402697 (June 24, 2004), the mandate in this case shall not issue until further direction from the panel.

APPENDIX B

[1] UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Case No. 3:01CR252 (JBA)
July 22, 2003

UNITED STATES OF AMERICA,

vs.

ALFRED LENOCI, SR.,

Before:

THE HON. JANET BOND ARTERTON, U.S.D.J.

APPEARANCES:

FOR THE GOVERNMENT:
UNITED STATES ATTORNEY'S OFFICE
157 Church Street
New Haven, Ct. 06510
BY: MICHAEL SKLAIRE, ESQ.
RONALD APTER, ESQ.

FOR THE DEFENDANT:
JACOBS, GRUDBERG, BELT & DOW
350 Orange Street
New Haven, Ct.
BY: IRA GRUDBERG, ESQ.

Sharon Montini
Official Court Reporter

SENTENCING TRANSCRIPT

VOLUME I

[2] THE COURT: Good afternoon, ladies and gentlemen, counsel. Please be seated. We are here this afternoon in the sentencing hearing in United States of America v. Alfred Lenoci, Sr. 01cr252. May I have appearances, please.

MR. APTER: Ronald Apter and Michael Sklaire on behalf of the government.

MR. GRUDBERG: Ira Grudberg on behalf of Mr. Lenoci who sits beside me.

THE COURT: Good afternoon.

Mr. Grudberg, Mr. Lenoci, would you kindly come to the lectern.

Warren Maxwell who prepared the presentence report is present in the courtroom, along with U.S. Probation Officer Jackie Carroll.

All right, Mr. Lenoci, have you had the opportunity to read the presentence report including its five addenda?

THE DEFENDANT: Yes.

THE COURT: And do you understand the contents of the report?

THE DEFENDANT: Yes.

THE COURT: And have you had an opportunity to discuss it with Mr. Grudberg?

THE DEFENDANT: Yes.

[3] THE COURT: Have you had the opportunity that you wanted for input on the contents of this report to the probation officer?

THE DEFENDANT: Yes.

THE COURT: Is there any reason why we should not proceed with sentencing today?

THE DEFENDANT: No.

THE COURT: All right then, with respect to the factual statements that are contained in the presentence report that bear on the issue of sentencing, I don't have any objections; is that correct?

MR. GRUDBERG: Nothing other than what I wrote, and I don't know that those address the factual things as much as—

THE COURT: As the legal inference or consequences.

MR. GRUDBERG: Yes.

THE COURT: All right, I'll see if I can summarize those, some of which gets into some of the more arcane parts of the federal sentencing guidelines. So that I will adopt the factual statements in the presentence report and its addenda, and we will have colloquy then on the import of those facts.

[4] Mr. Lenoci stands convicted of two counts by his plea, one of bribery, in violation of 18 U.S.C. 666(a)(2), the other, Count Two, theft of honest services mail fraud, one relating to the bribery of Joseph Ganim with respect to the various development projects, Count Two being the theft of honest services of Mark Trinkley, a state official.

All right, there is a dispute between the parties as to whether or not Count One and Count Two should be grouped. The analysis for Count One, the analysis for each count is not disputed, whether they should be grouped is disputed. If they are not grouped, the way the guidelines provide for multiple counts would produce a two-level increase. Am I correct about the results of a grouping, not grouping decision?

MR. APTER: Yes, your Honor.

MR. GRUDBERG: That's my understanding, Judge.

THE COURT: All right. So that if they are grouped, the total offense level is a 15, with a criminal history category of 1, and an imprisonment range of 18 to 24 months. If they are not grouped, it is an offense level 17, criminal history category 1, imprisonment range 24 to 30 **[5]** months.

MR. GRUDBERG: After the three levels for acceptance, yes.

THE COURT: And then to back up on how we get to those, by way summary, we have a base—this is for Count One, a base level under 2C1.1(a) for bribery, which is a level 10. There is an increase of eight under 2C1.1(b)(2)(B) for payment for the purposes of influencing an elected official, and that's an 18. Count Two, under 2C1.7(a) is a level 10, with an increase of four under the fraud guidelines of 2F1.1(b)(1)(E) for the value of benefits.

It's undisputed that Mr. Lenoci meets the requirements for a reduction for acceptance of responsibility under 3E1.1 (a) and (b)(2) reducing his level by three with the grouping result that I earlier outlined.

All right, I will hear you on the grouping issue in just a moment.

Is Mr. Lenoci pressing a claim for minor role?

MR. GRUDBERG: No. In one of my letters I indicated on one I couldn't make the argument, on the other I didn't think it made any difference.

[6] THE COURT: All right then, the probation office has done an analysis under the impact of the plea agreement, a three-level increase for manager-supervisor role would be justified. That may be the case. The plea agreement does not contemplate any role enhancement. I do not understand the government to be pressing for a role enhancement.

MR. APTER: That is correct, your Honor.

THE COURT: All right. I think that while—I think that in the interest of giving effect to the plea agreement, that we will not focus on any role enhancement. I believe that means that the one issue with respect to offense level that remains in dispute is grouping.

MR. GRUDBERG: One item was raised for the first time 24 hours ago in the fifth addendum, and I don't know, I think that also flies in the face of the stipulated guideline calculation on each of Count One and Count Two, and I don't think grouping has anything to do with whether or not that should—

THE COURT: And this is whether or not there should be an additional two-level enhancement for more than one bribe.

[7] MR. GRUDBERG: That is correct.

THE COURT: Recognizing that each of the two counts involves one bribe and that if they are grouped that the argument would be raised, and has been raised by the government, that that then triggers that two-level increase.

MR. GRUDBERG: Except I would take exception to that because—

THE COURT: I'm going to let you do that. I just want to identify what issues we have to resolve before we get to hearing about the government's 5K1.1 motion and where sentence should be imposed, okay?

MR. GRUDBERG: You're the boss.

THE COURT: Since it is the government who disagrees with the probation officer's grouping analysis, or proposes as the alternative that the two-level enhancement for more than one bribe would be appropriate if grouped, I'll hear from you on that subject, Mr. Apter.

MR. APTER: Thank you, your Honor. Your Honor, I would submit that whether these two counts are grouped or not, that the end result, adjusted for acceptance of responsibility, is a level 17. I submit that the two counts should not be grouped in **[8]** the first instance, and I refer the Court to the guideline section 3D1.2 which provides instruction as to what types of offenses and which guideline sections to which the grouping analysis should be applied.

If I understand the probation officer's report, they're relying on Section 3D1.2(d), which says that offense—when the offense is determined largely on the basis of the total amount of the harm or loss, or the quantity of a substance involved, or some other measure of aggregate harm, then the guideline is written to cover such behavior. Then it goes on to list the guideline sections to which this grouping should be applied, and it includes 2C1.1, which is the guideline which is applied in this case.

However, if you look at guideline section 2C1.1 it's somewhat different than the other guideline sections to which this 3D1.2 applies in that it's a hybrid. In certain instances an enhancement is applied based on the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government, and that subsection was applied by the Court in computing the guidelines for **[9]** Mr. Pinto, Mr. Grimaldi, Mr. Ganim and others, but Subsection B, (2)(B) provides an alternative enhancement which is not based on a numerical number for which incremental harm can be factored in, but rather, provides for a fixed eight level increase where the offense involved the payment for purpose of influencing an elected official, and that is the subsection that's been applied here.

So, that section really falls outside of the type of offenses and guidelines calculations that are contemplated by 3D1.2 (d) in that it has nothing to do with total harm of amount or loss or aggregate harm, and it doesn't by definition take into account incremental harm resulting from additional offense conduct.

So, I would submit that the probation office's reliance on 3D1.2 in this case because of the way Mr. Lenoci's guidelines were calculated is misplaced. As a result, you would take—you would do the analysis that the Court just engaged in. On Count One, you have a bribe to Mayor Ganim with a base offense level of 10, plus 8 for the elected official, and you are at an 18, and Mr. Trinkley's bribe you'd be at a four, because they're within four of each other, would you get a **[10]** two-level enhancement to the greater of the two groups, and you result at a level 20, less three for acceptance puts you at a 17.

Even if you were to group the two offenses as probation insists, then what you have, and you must take into consideration—I do believe this is squarely contemplated by the defendant having plead to two separate counts of two bribes to two separate officials, is multiple bribes. So you are going to group the two counts, you would still be at a base level 10, you would add the two for multiple bribes, which is subsection (b)(1) of 2C1.1, and then you'd also have the eight levels for elected official, and you are again at level—plus less three for acceptance, puts you at a 17. So I would suggest either way you are a guideline range of 17 with a corresponding sentencing range of 24 to 30 months.

THE COURT: All right, Mr. Grudberg.

MR. GRUDBERG: If the Court please, I don't really think the grouping thing has any impact on how many bribes there were. The fact is that we see all the time in a one-count indictment that if there is more than one victim, it goes up and so forth, even though it's only one charge. **[11]** And what you have here, both in Count One and Count Two, is not a single bribe, or in Count One a single offer of a bribe. Your Honor sat through the trial, there is a claim that—and it was admitted that in 1999 the promise to pay one dollar a foot for developed space once there was a certificate of occupancy, was an offer of a bribe. There was a meeting the following year at the restaurant in Norwalk where there was an offer that they would raise a half a million dollars for a gubernatorial run. That clearly was an offer of a bribe. The same way with Trinkley, there were a whole number of things that were done. You are talking about multiple things.

When we sat down, and it has nothing to do with the grouping, when we sat down and reached the stipulation as to offense conduct, we stipulated 10 plus eight on Count One, and it seems to me that if the government or if Mr. Maxwell or the Court said, well, wait a minute, you left out the provisions of 3D—

THE COURT: 2C1.1(b)(1).

Mr. Grudberg: 2C1.1(b), that's one thing, but for the government to put this in sort of—in the guise now at the eleventh hour, **[12]** yesterday we got this, that the claim was being made that if you grouped them then you've got two bribes, one to Ganim and one to Trinkley, it is just a way to try to foil the issue on the grouping, and it just seems to me it flies in the face of our agreement as to—in other words, if I had looked at 2C1.1 (b) back in October of 2001 and counted how many bribes there were on Count One, and if we stipulated that the base level was 10 plus two for multiple bribes or offers, plus eight because of public official, we would have stipulated to a base offense level of 20, and the same way on Count Two, it would have been base offense level of 16 because there is nothing in 2C1 that talks about different victims or anything.

I think, secondly, if you do group them, it doesn't make them exactly the same offense, it just says they're grouped. I think it was the same. They all had a lot to do with each other. The Father Panik Village development had been awarded and Trinkley was bribed to help make it go, but I think it's not the same offense. They're two separate offenses and I don't think you jump from Count One to Count Two to say two bribes just because they're grouped.

[13] The Court: How does that affect your argument on grouping if they are two separate offenses?

Mr. Grudberg: No, I don't think it's grouped if there is only one offense. I did argue that it was—both of them involved the bribery. First of all, I agreed with Mr. Maxwell's grouping based on what he—how he sized the thing up. In terms of the harm, I pointed out that I don't think that the government said there are two victims, and the particular behavior in these particular offers of bribe, or bribes wrote elsewhere, does not result in a victim anywhere.

You've got the claim of loss of honest services and so forth, but the fact is that if the city in response to something that Mr. Lenoci told Mr. Pinto awards the development for Father Panik, or anyone else, the only one they got was Father Panik, anything that's paid by way of a bribe later on if they do the development doesn't come out of the city's coffers, it cuts down any profit margin, but unlike the kinds of things in term of the environmental and other so-called rip-offs where the city paid more for what got done than it should have, and prices were inflated, neither one of **[14]** these have that aspect at all. I think there are no victims.

Then I went on to also indicate that I think under 3D1.2(c), if conduct which is embodied in Count Two is the same kind of conduct set forth in the plea agreement, is a necessary element characteristic of Count One, namely that the defendant gave, offered or agreed to give anything of value corruptly with the intent to influence, they're two separate offenses, but under 3D1.2(c) the way it's written, since they are the same in terms of their element, they can be grouped.

It doesn't make it the same offense, it just means they're grouped for purposes of the guidelines. It doesn't say that it's the exact same offense. And then to say just because they're grouped now you go back to the two-level enhancement under 2C1(b)(1) I think is wrong because if that were in the game, clearly there was more than one bribe or attempted to bribe, based on the government's theory, and they didn't raise that at the time of the plea agreement.

So, you know, getting this in my lap 24 hours before sentencing didn't help my digestion last night, but I think if one looks at 2C1(b)(1), **[15]** it doesn't talk about different victims, it doesn't talk about whether it's a bribe of two different people, as you do get in some guideline things where there is more than one victim. Just two victims, two separate victims, it talks about two bribes, and clearly there were two bribes on Ganim and more than one, I don't know how many, much smaller numbers with Trinkley, but that's not what we stipulated to, and I think just to get it in now from the government based on—I mean, obviously if the Court holds that they shouldn't be grouped we don't get to this, but I think for the reasons stated by Mr. Maxwell and agreed to by me, and also based on my undated letter which was the 16th of May, I think there are good reasons to group these, but it doesn't make them the same offense.

THE COURT: I disagree with the probation officer and you with respect to grouping. Informed by the sorts of groupings illustrated in Advisory Note 6 and reflecting on the fact that Count One and Count Two are arrived at not by some measure of aggregate harm, not by the—meaning Count One is driven by the fact of payment to influence an elected official, Count Two is driven by the value of the benefits or loss, that you **[16]** don't have the kind of aggregate value that is a predicate for this concept of grouping. To say that the offense behavior is ongoing or continuous in nature as a basis, is to, in my view, take the conduct that is charged in Counts One and Two and raise it to such a level of generalization that one could group across a lot of lines where the nature of the criminal offenses is the same, while in this case, while at the bottom line it is an endeavor to buy the influence of public officials, one is elected, one is not elected, they're two different programs, and the difference of officials, schemes, the official's status, seems to me to fall outside what is contemplated to be achieved by the grouping.

That being said, as you have noted, we don't get to this other issue of whether a two-level enhancement for multiple bribes should be applied, and thus the total offense level that is under—that is determined is a 17 with an imprisonment range of 24 to 30 months.

Now, we have as well a 5K1.1 motion by the government seeking a downward departure on behalf of Mr. Lenoci, Sr. for his substantial assistance in the investigation and prosecution of **[17]** other persons who have committed offenses, and therefore, I'd like to hear from the government in the manner that reflects all the considerations that the government has as to where a sentence should be imposed: That is, the nature of the assistance in terms of the five factors, as well as the nature of the offense producing the guideline range from which the government seeks the Court to depart.

MR. APTER: Thank you, your Honor. And in addition to my written remarks in the memo that was submitted in support of the 5K motion, I would offer the Court the following observations:

"Deals are my art form. Other people paint beautifully on canvass or write wonderful poetry, I like making deals, preferably big deals. That's how I get my kicks," so says Donald Trump, the well-known businessman and developer. Trump's plans, as the Court knows, at one time included bringing casino gambling to Bridgeport for which he hired Lennie Grimaldi to serve as his eyes and ears, and thereby, unbeknownst to Mr. Trump, setting in motion a snowball of graft and corruption and scandal that are sure to be the indelible legacy of the Ganim mayoralty. Crimes in **[18]** which the Lenocis played a seminal role.

Alfred Lenoci, Sr., the president of United Properties, the most prominent and profitable commercial real estate development company in Bridgeport, has been described in Trump-like terms. Mr. Lenoci has been making deals in Bridgeport for 40 years, bringing shopping centers, office buildings, supermarkets and movie theaters to once vacant and blighted tracks of land.

Mr. Lenoci apparently has a genius for looking at a property and seeing its best and highest use. Like Michelangelo, who it is said could take a block of marble and chip off the unnecessary stones to set free the angel inside, Mr. Lenoci was an artist in the business world. But rather than a chisel, the preferred tool of Mr. Lenoci's trade, it seems all too frequently, was an envelope full of cash.

At the outset of the FBI's investigation in Bridgeport, the agents heard a story about an untold secret of Mr. Lenoci's success. The story was repeated by more than one source. Mr. Lenoci, it seems, would invite key decision makers, politicians, zoning officials, bankers out for a **[19]** pizza lunch. There would be small talk followed by business talk, and then he would get around to the real point of the meeting. Mr. Lenoci would say "Do you like pizza? I do. I like to cut my pizza into many pieces so that there is enough for everyone. So that everyone gets a slice of the pie." Of course, pizza was only a metaphor for the lucre to which Mr. Lenoci was actually referring.

During the Ganim years, Mr. Lenoci was thinking big about Bridgeport. He would settle for nothing less than serving as the preferred developer for all the city's major projects, Steel Point, Father Panik, Car Tech, and the arcade. And he was willing to pay for his seat at the table. He paid Paul Pinto, his protege and pizza delivery boy, hundreds of thousands of dollars to open the doors of city government, and in particular to take care of Joe Ganim, to buy him the finest meals and fanciest clothes in order to secure the mayor's support for United Properties development projects. If progress slowed or the deals were stalled, Mr. Lenoci reminded Pinto "Maybe you are not taking care of Ganim enough."

Mr. Lenoci understood the art of the deal and the critical importance of Ganim's support **[20]** to his success in Bridgeport. He freely kicked in thousands of dollars directly to contractors who were building the mayor's Black Rock home at no cost to Joseph Ganim. To Mr. Lenoci, it was just another cost of doing business in the city of Bridgeport.

Mr. Lenoci sanctioned paying Ganim and Pinto a dollar a square foot for the Father Panik project, which if it had been completed would have netted them a cool $350,000. And for Steel Point, which Pinto described as the granddaddy of all deals, he and Ganim between them stood to earn three-quarters of a million dollars. Mr. Lenoci's desire to control the Steel Point deal was complicated by the fact that the city was already under contract with another developer. The solution, sweeten the pie and agree to raise $500,000 for Ganim's gubernatorial campaign. Had the feds not intervened, it is likely that construction of Lenoci-Harbor Place would by now be well underway.

But Ganim wasn't the only politician who feasted at Lenoci's table. There was the Bridgeport Planning and Zoning official who received $30,000 in cash to support the Lenocis' **[21]** controversial plan to construct a Super Stop & Shop in Bridgeport. There was the Milford planner who received $10,000 in cash for his help in shepherding the Lenoci golf course through the zoning process. And there was Mark Trinkley, the senior developer for the State of Connecticut Department of Economic Development who controlled the purse strings for millions of dollars in state aid that the Lenocis coveted for their development projects in Bridgeport.

Mr. Lenoci co-opted Mr. Trinkley by landscaping his home, building him an English garden, and providing him with tens of thousands of dollars worth of other personal benefits. "Don't worry," Mr. Lenoci assured the skittish Trinkley, "we have people who do these things, it's all taken care of."

Mr. Lenoci boasts about his contributions to his beloved Bridgeport, the enhanced skyline, the jobs created, the increased tax base, the invigorated sense of civic pride, and he rightfully deserves some of the credit for the city's revitalization. But Mr. Lenoci is indifferent to the unsavory side of his ambitions; the bribes paid, the competition stifled, and the **[22]** debates silenced. And he is blind to the fact his misdeeds have not only diminished the significance of his accomplishments, but have also lessened the importance of the man. Ayn Rand, the Russian author and philosophy said this: "A building has integrity, just like a man, and just as seldom."

Mr. Lenoci cooperated with the government and the information he provided was useful. He corroborated his own corrupt dealings with Joseph Ganim and Paul Pinto. He acknowledged paying Pinto handsomely to wine and dine Ganim. He told the government how the fix was in regarding many lucrative city projects. He admitted to agreeing to pay Ganim and Pinto a dollar a square foot in return for securing Ganim's support for Father Panik, Steel Point and other projects. And he acknowledged both the necessity and his own willingness to pay to play in Bridgeport.

Mr. Lenoci's cooperation was timely, it was truthful, and it was complete. He pleaded guilty and he assisted in the prosecution of Joseph Ganim for which he deserves consideration from this Court in the form of a downward departure from his sentencing guideline range.

Before you soon will stand a man who is **[23]** 68 years old, in poor health, and whose impeccable reputation and standing in the community has now been tainted by scandal. Yesterday I witnessed this Court as it sentenced his son to 18 months in prison, and the government recognizes these are also factors the Court may consider in determining an appropriate sentence.

But in imposing that sentence, your Honor, I would ask the Court to also consider upwardly departing from the defendant's fine guideline range. Simply put, as I put yesterday, the fine range in this case, four thousand to forty thousand dollars, is inadequate. It is merely pocket change for a man whose personal net worth exceeds thirty million dollars. Anyone who is willing to spend hundreds of thousands of dollars, as was Mr. Lenoci, to corrupt the political process, should be required to relinquish like amounts as part of his punishment. And it is only through the imposition of a substantial fine in conjunction with the other sanctions that the Court will impose that Mr. Lenoci can be sufficiently punished for his conduct in this case.

THE COURT: When you refer to "like amounts," there is no victim eligible for **[24]** restitution in Mr. Lenoci's case. What is the like amount that you refer to?

MR. APTER: Well, in the absence, I would ask the Court in the first instance to consider Mr. Lenoci's relation with his son, his involvement in the same course of conduct, and look to those amounts that the Court looked to yesterday in setting a fine. In the alternative, I would ask the Court to impose a fine up to the statutory amount for each count, which is $250,000.

THE COURT: The guideline range you cited as up to 40,000, I believe it's 50,000 for the offense level of 17, is it not?

MR. APTER: It may be, your Honor. I looked at the probation officer's report, and that may have been in connection with the guideline range of 15 rather than 17. Let me just check.

Your Honor is correct, five to fifty thousand is the fine range. That applies to the guidelines as they have now been determined by the Court.

THE COURT: The level which drives Count Two, the value of benefits is between 20 and 40,000. How is it that the government analyzes the portion of the application notes which clarify that **[25]** the commission had in mind that a fine should equal twice the gain or loss?

MR. APTER: The first count, your Honor, to which Mr. Lenoci pleaded guilty, Mr. Lenoci entered into a corrupt agreement with Mayor Ganim and Paul Pinto to pay them hundreds of thousands of dollars in return for the performance of official acts by Mayor Ganim, namely awarding or influencing the award of contracts, and I would ask the Court to consider those amounts as the benchmark for determining an appropriate fine in this case.

THE COURT: Is the hundreds of thousands of dollars you refer to for Count One the dollar for each square foot?

MR. APTER: It is, your Honor, because that agreement contemplated Father Panik, which as the Court knows, was planned to be a three hundred to three hundred and fifty thousand square foot light-industrial park in Bridgeport. The deal also contemplated Steel Point, which was contemplated to be half a million to a million square feet of mixed use commercial and retail space, and there alone you are talking about had those deals been completed and the projects built, in excess of a million dollars in kickbacks to Ganim and Pinto.

[26] THE COURT: Commentary Application Note 4 refers to that, the contemplation of the maximum of the guideline range will be at least twice the amount of gain or loss resulting from the offense as opposed to contemplated by the offense, saying specifically where two times either the amount of gain to the defendant or the amount of loss caused by the offense exceeds the maximum of the fine guideline, an upward departure may be warranted. What is the amount of gain or loss resulting from the offenses Count One and Two that the government has qualified?

MR. APTER: Well, I think your Honor is correct with respect to Count Two, that the amount of the benefits provided was within the neighborhood of $35,000, and that is the most quantifiable figure that actually changed hands as a result of either of the two offenses. The alternative fine provision, however, as I noted a amount ago, also provides the Court with authority to impose a sentence of up to $250,000, and if the Court is uncomfortable with pegging a fine to the figure I've just enumerated, I would ask the Court to use the statutory figure of $250,000.

THE COURT: Thank you.
[27] All right, Mr. Grudberg.

THE COURT: Excuse me.

MR. GRUDBERG: May it please the Court, before I lose it, I am not so sure your Honor clearly is correct as to the numbers on the Trinkley thing, and I'm not—benefit or gain or loss to anyone, I think there was no loss to anyone, and I think benefit talks about benefit to the person being sentenced, the defendant. So, I just don't know, although the $35,000 clearly was the range of what Trinkley got, the value of what he got.

THE COURT: There is something a little bit odd about that, isn't there, Mr. Grudberg? If, in fact, what was contemplated by the bribes was so much larger than that, wouldn't the Court have authority under 5K2.0, where the sentencing guidelines have not calculated a fine with respect to gain or loss, where the contemplated gain or loss was vastly in excess of what the maximum fine would be?

MR. GRUDBERG: I think that all of that is extremely speculative, if the Court please. In terms of the loss to the City of Bridgeport, there would have been none. If in fact Father Panik—

[28] THE COURT: It's contemplated in benefit to Mr. Lenoci.

MR. GRUDBERG: I understand, but we just don't know what that would be. That's totally speculative. The fact is they couldn't put the deal together. They put $250,000 into Father Panik and got nothing out of it. That's business.

But to sit and speculate as to what would have happened if in fact they finished Father Panik, what would have happened if they got Harbor Point, Steel Point, when in fact everybody knows that three, three and a half years later there hasn't been a shovel turned at Harbor Point, it looks like the thing will never—possibly never be done on the kind of plan they were thinking about, never got carpenter steel, never got the arcade.

So I think while—and I addressed this in one of my letters, well, the government talks about huge windfalls. We don't know. The fact is, the history of Mr. Lenoci and his company is that they're very good at what they do if they get the tenant, they've been able to get financing, which of course they can't get now at all. They can't even refinance in a market that people are making **[29]** tons of money in refinancing because the banks won't touch them.

So that's a little different, but to say that they would have made X dollars on Father Panik if it went forward, the fact is they didn't make anything, they just put a big investment in, totally without regard to whatever Trinkley was paying, and nothing happened. The deal didn't and couldn't fly. There was one potential tenant, that tenant went to Tennessee. They were unable—there was nothing on the horizon to draw anyone in there, so the building was never built. Whether it was going to be 300,000 square feet or whatever it was going to be, it was never built, and that goes back four years, it hasn't been built now.

Now, the fact that since all hell broke loose with this case and so forth, it's pretty much impossible for them to do any development. On the other hand, nobody has done anything with any of the four properties that they talked about. They were going to yield a huge fortune to this man, his sons, his family. It hasn't happened. It's totally speculative, and, you know, we talk about large numbers, and the fact is that Al Lenoci has made a lot of money in his life, but you have to **[30]** get the deal and you have to make it go. All kinds of things have to happen.

The fact is that nothing has happened on any one of those four pieces in Bridgeport, and to have the Court speculate on what would have been a benefit to him, if in fact he had gotten Steel Point and managed to calm the neighbors down, all of the kind of things that have not been done by the new developer that took over for Alex Conroy and his people, nothing has been done.

THE COURT: Is that then where the losses and gains are either impossible to calculate or would consume so much time to calculate, is that the role of the alternative fine?

MR. GRUDBERG: I don't think so.

THE COURT:Why not?

MR. GRUDBERG: Because there is no harm that was going to come to anyone, and we just don't know how much he would have made, and, you know, to come in with the alternative fine, it's one thing if you had some kind of idea that he would have made money. The fact is all we know is he didn't make any money, it cost him a bunch of money, and I don't think the alternative fine is appropriate under these circumstances.

[31] THE COURT: All right. I'll hear you then on the sentence itself.

MR. GRUDBERG: Yes, your Honor.

You know, it's very difficult to deal with stories that supposedly people are telling about pizza and how many pieces the pizza got cut up into. The fact is, we are here. As far as Bridgeport goes, the first incident was one where they had gone before the zoning board and been turned down and then someone contacted them, apparently on behalf of the head of the zoning board, I mean that was an extortion, for goodness sakes. Did they have to pay it? No. But to say that this is a way of life for Al Lenoci, based on the evidence they have, is outrageous I think. It's always easy to talk, people are telling stories.

The fact is, and I was there when Mr. Lenoci sat with the government also, the kinds of money—first of all, I think it's totally inflated as to what they say Paul Pinto got, but the fact is Pinto, aside from the mayor, Pinto was able to facilitate things and so forth, and when he had done something and they got something from a board, they gave him something. But where the **[32]** number of hundreds of thousands of dollars comes from, I don't know.

And you have the—you know, I worry about doing this because the last thing in the world I want to do is stand here and make it sound like Mr. Lenoci did the right thing or didn't commit a crime. On the other hand, I think you have to look at what he did and what the story was. The fact—and to say that this was seminal, that he was a seminal figure in the corruption in Bridgeport, I think there is zero evidence of that in the record; zero.

The fact is, sure, they came to him, they wanted money for campaign contributions, they wanted this, they wanted for the mayor's brother, for the mayor and so forth, and the winks and nods and so forth, but the fact is that after a very significant period of time the only thing that anybody had approved the Lenoci interest to handle was Father Panik. The only thing.

It's not like—and the fact is that all of the indications we have from our point of view is that Pinto was pushing, Pinto was pushing, putting his hand in their pocket, not only to give a bunch of money, but raise a bunch of money, and **[33]** you know, Mr. Gulash talked about it a little bit yesterday, but Mr. Maxwell is correct, there is a problem with our system of raising money. I pick up the New Haven Register and you look at all of the contributions to the mayor, and clearly the Fusco interest have gotten lots of work from the city, they are significant contributors, the

Laydon Company does all of the roads, you know, they're going to be there. Almost everybody who works for the city chips in.

Is all of this very nice? No. Is any or all of it illegal? I don't know, probably not. It may be a national disgrace the way all of our money is raised, although they have done very little about it in Congress but talk.

So, what had been happening was they were having their arms twisted and twisted and twisted, raise more money, organize a trip to Foxwoods and get your subcontractors to chip in money and so forth, and it was just going on and on and on, and that's when they sat down and said, look—the family, you know, he and the young Al and his brother, Mr. Schinella, and decided, look, we've just got to stop this, and that's where the one dollar a square foot came from. Absolutely **[34]** illegal, absolutely wrong. On the other hand, it was their attempt at, one, stop paying and, two, get something concrete. That's why it was illegal.

THE COURT: Sort of bribe prepayment.

MR. GRUDBERG: Yeah, a promise. It's a promise. And Mr. Lenoci doesn't stand here and say it was the right thing to do. Obviously it was not the right thing to do, but to say somehow that the Lenocis were seminal in creating the corruption in Bridgeport is nonsense and it's unfair and it's totally speculative. It ignores the facts that they pick two or three things that he told them about.

I mean, the fellow in Milford, and your Honor read the Pre, he's upset about Trinkley. I'm a little bit upset by Trinkley's sentencing memorandum which I read, and I think it's overstated in terms of golden tongue Al Lenoci, Sr., but Mr. Lenoci indicated to the probation department, to me, that he's very upset about having, in effect, gotten Trinkley in that.

Trinkley didn't come asking him for money. But if you go back on the history of that, too, your Honor, their first dealings with Trinkley were after they had torn down the hotel on—next **[35]** door to the courthouse, down a block from the courthouse, and they put up the Bob's there. As shrewd a deal maker he is, he didn't know about what Trinkley did and so forth. It wasn't until after they did the deal, after they put it up that they realized they could get a grant from the state, from Mr. Trinkley's organization, and they put in for it and they got it. Didn't pay him a nickel, had nothing to do with it.

And Trinkley's—Mr. Ruane on behalf of Mr. Trinkley pointed out that really it was Trinkley's job to go to people and try to get tenants in, try to help them, try to help the developer. That's not corrupt. That was what their job was. That's what his job was, and that's what the state money was going to be for, to help make the deal more doable and enable him to borrow less money, help him get tenants in and so forth. So, he wasn't doing anything wrong.

Trinkley, other than accepting gifts when he shouldn't have, and they shouldn't have been given to him, okay, that didn't begin the corruption in the City of Bridgeport. Your Honor sat through the trial, and I just read it in the newspaper, but the thought that Al Lenoci and his **[36]** son and company were seminal in anyway in changing the face of Bridgeport—and I think it's also unfair to make it sound like all—everything they did in the city of Bridgeport came through corruption. There is absolutely no evidence of that except concerning the Stop & Shop where Mr. Lenoci in his full disclosure to the government indicated that he had been approached and had his arm twisted.

You know, he could have said no, of course he could have. On the other hand, you know, where the line is between extortion and bribery may be a bit difficult, but based on the only evidence they have of that, out of my client's mouth, is it was a lot more of an extortion than a bribe. And clearly it didn't start anything bad in the City of Bridgeport. There had been, and he told it to them also, there had been significant talk that the person who was the power on the planning and zoning commission was not necessarily honest, and a good friend of that person came to Mr. Lenoci after they had been turned down and said, you know, "If you pay money you can have your store, I'll get you your store."

Now, before I launch into anything, would **[37]** your Honor give me a clue as to whether you will grant the 5K1 motion.

THE COURT: Yes. Obviously the government believes that the cooperation of Mr. Lenoci was of sufficient substance such that it has exercised its discretion, and in its sole discretion, to move for that departure, and I, in particular, have to rely on the government's evaluation of that since Mr. Lenoci did not testify at trial.

MR. GRUDBERG: I didn't want to go into a number of technical arguments concerning other possible reasons for departure downward, I can just talk about his health as long as your Honor has granted the motion, you have the power, and I'll just talk about some of those items.

I've gotten to know Mr. Lenoci pretty well in the last two and a half years, and I don't stand in front of a court very often, and I like to believe I'm a truth teller, it's almost impossible not to like this man. I think that comes through in a lot of ways, and it has more to do with his overall generosity, his overall goodwill, the way he treats people.

In addition to all the money that he and **[38]** his company have done by way of charity and all the money he goes and raises charity from someone else, and people say he's hard to say no to, but it's almost impossible not to like this man. And I think that the whole thing about the greed and avarice and so forth is just over done here. This is a man who, as the Court knows, at the age of nine years old was working. He did not have a great childhood in terms of on the paternal side. He had an abusive and seriously drinking father, and when the family was left that way, Al at a very young age, Sunny, everybody calls him Sunny, at a very young age was working, out there working while he was going to school, and he was working pretty hard because what little money he made as a teenager was very important to keep the household afloat.

One line, and I forget where it was, I think it was in the Pre, and I think his wife described Sunny as the fastest tire changer in Fairfield County. You know, lots of people are known for lots of things, and the fact is that here is someone who started with less than nothing, not immensely schooled, he didn't make his money by getting an MBA at Harvard or someplace and going **[39]** down to New York, he made a bunch of money by being very successful at what he did, and I guess it's pretty clear he did have some sort of genius for this sort of thing. Time and again people will say that he knows how to look at a piece of property and knows what should be there.

While I think the government's statements concerning the harm he did to Bridgeport have been grossly overstated, I think the fact that what he has done positively for the City of Bridgeport is not overstated. You know, his properties on the tax rolls are better than 1.2, 1.3 million a year on properties that prior to that were bringing in very little. I think, as I understand it, we are talking about some thousands of jobs on the properties that he has developed, in addition to what went into building them and so forth.

And, you know, he hasn't only done this in Bridgeport. I think I talked to Al Jr, and he indicates that he thinks that their companies, their developments put together the largest single taxpayer in the city of Fairfield. They built all around. They're good at what they do, and, you know, he doesn't have to apologize for that.

[40] For what he did here, obviously the Court, the government, everyone else is entitled to an apology, but he, as you know, is 68 years old. As Mr. Apter says, he's got lousy health. He's blind in one eye. He had a heart attack eight years ago, underwent cardiac catheterization at the age of 60. Significant myocardial infarct, he's hypertensive, high cholesterol, diabetic, arteriosclerotic heart disease. He's not a very healthy man.

Most recently there was a serious question of prostate cancer which, as I reported to Mr. Maxwell, appears to be lesser of a problem, but they don't know. The report that we gave indicated that his PSA had been under four, which is really not teeny, and was up to about 5 and a half before the most recent medication, but I can't stand here and tell you that they made a diagnosis of prostate cancer, but they haven't walked away from it yet either, they're watching him carefully.

And I think that, you know, there have been cases, combination of age and health worse than Mr. Lenoci's which have justified very significant downward departures, the most notable being Judge Burns in the Rioux case went down 10 or **[41]** 12 bases on a combination of health which involved a kidney transplant 20 years before which hadn't been a problem, plus good works.

He's got good works, a ton of them, in addition. The push to be the best developer, the biggest developer, I was there when Mr. Leroci said something like that, and your Honor is aware of what income he has just from his present properties and how relatively modestly they live. This is a man who lives in an eight-room home, not a mansion, and he's not cheap, as we know because he gives away a bunch, and he's very, very generous to others, aside from charity, but he has a drive to be the best I think. It's not a bad thing for trial lawyers, it's not a bad thing for anyone. Clearly they went across the line, but the fact that he wanted to develop these things, there is nothing wrong with that.

In the last four or five years, the impact on him has been very significant. He has insomnia, very nervous, he wakes up soaked in sweat, he's gained weight. Your Honor knows about the times he was out in the middle of the night when his children were younger, concerned with that. You know, the Donald Trump thing, I got to **[42]** tell you, I think it's totally irrelevant and kind of a low blow, but this man is no Donald Trump. I don't know what Donald Trump started with, but Donald Trump certainly knows how to make money, certainly knows how to develop, but this is a man who has been known in the community much more than just for the properties he's developed and the money he's made, but rather for who he is, what kind of person he is and what he does for the community.

And in addition to the money he's given, he spent nine years on the board at St. Vincent's. He's given of his time, he goes out of his way for friends and people who aren't even friends. Apparently he can't say no to anybody, or doesn't think about saying no to anybody. If you've got a business deal, you want to run it by him, he'll look at it very, very carefully. If you need his help, you've got it. That's what everybody said.

A couple of people are going to be here to talk to the Court briefly, in addition to his wife. I think in addition to the emotional toll he has wreaked on himself by his behavior here, it's worth mentioning the fact that not only did he and his companies not make any money on these things, **[43]** but it has cost him a fortune. They cannot refinance, they cannot go forward with new projects because he's a pariah with the banks, and he was a genius with the banks. I mean, primarily what he did was to spot the property, figure out what's best for it, find a user and get the money from the banks. And the banks loved him.

Now, of course, not that he's ever not paid a mortgage or ever stiffed anybody, the banks won't touch him with a ten-foot pole, they're just sitting—I mean, they have plenty to do with what they have, but the fact is they've lost untold kinds of opportunities to develop other places, and the kind of money that could have been saved in refinancing, big, big bucks based on the kind of property there is.

I don't want you to feel sorry for Mr. Lenoci because he's got plenty of money and your Honor knows that, but I am saying there has been a lot of payment for what he did and what he got his company into on this. I truly believe that based on his age and based on the fact this offense was very, very different from the people, including his son, that were making money on the city on things that were rip-offs of one kind or another, **[44]** that's not what this was. If the deals ever went through maybe he makes money, maybe he doesn't, but the city wasn't going to lose, the state wasn't going to lose, and I think that in that way, even though this corruption, you have to start with the fact that he didn't start the corruption, he was in a particular position to want to be a favored developer, and he did absolutely the wrong thing, but he didn't start the corruption, and anything that he would have done, would it have happened, would not have caused the City of Bridgeport a nickel, it would have gotten, as they always have when he has developed on anything, the first class product, additions to the tax rolls, and the city would have benefitted. Unfortunately obviously Pinto and Ganim would have improperly benefitted also.

I stand here based on everything I know about this gentleman and looking at the offense, and I strongly urge your Honor to put him on some sort of home confinement. A place in Hartford is not a particularly good place for someone his age, it's a lot worse place to be by and large than one of the camps, but I think home confinement other than for work and church is an appropriate **[45]** sentence.

Unless your Honor has any questions, I have nothing further.

THE COURT: No. Who shall I be hearing from?

MR. GRUDBERG: Mrs. Lenoci, Carol Lenoci.

THE COURT: Good afternoon, ma'am.

MS. LENOCI: Good afternoon, your Honor. I'm Alfred's wife. As a teenager at the age of 19 Alfred put up his first commercial building. I think that says a great deal. And he's continued to build through the years, both in the City of Bridgeport and the surrounding towns. As a young couple with two small children, after working a full week, he would take us out on the weekend and we would look for property. He would make the deal, I would write the contract, and that is how he really became so successful in what he does.

Alfred has given to the community in many ways. Of course one of them being his charities, giving of his time, his effort, monetarily and fund-raising.

Alfred is very remorseful for what he's done, for making a bad judgment call, and I think within the last several years, or two and a half **[46]** years, as long as this case has run, he has suffered both physically, mentally and monetarily. As Mr. Grudberg said, we are now at a standstill and have been coming onto a three-year period. I think that's a great deal of punishment to take, along with the newspapers and the publicity for a man his age and not being well. He's very remorseful for what he's done and any consideration you can give him today would be greatly appreciated by his family and by him. And I thank you.

THE COURT: Thank you.

THE COURT: Mr. Lenoci, do you want to sit down?

THE DEFENDANT: Yes.

MR. BERKOWITZ: My name is Jack Berkowitz. I've been—I'm a local businessman for the past 50 years, and I know Sunny Lenoci for well over 40 years. I had a restaurant across the street from the used car lot in which he worked, and we became friendly, like I said, over 40 years ago. Sunny started with a toothpick and he built a lumberyard. And he built that lumberyard through hard work, many hours, determination and a little bit of luck, and he was willing to share the proceeds.
[47] This is long before Ganim was ever mayor or any of these things ever happened. He shared the proceeds of his good fortune with not only his family, but more importantly with his friends and the community. I know that if I had a problem or if any of my friends had a problem, a busi-

ness problem, we went to Sunny, we got an answer, we got some advice, we got some time, and probably got some of his money.

Sunny, as his lawyer pointed out, has some medical problems, and because of those medical problems, and because of the fact that he leases a lot of property to doctors and physicians in this area, if you went to Sunny and you needed a doctor, or you needed a specialist, Sunny was going to go out of his way and get you this appointment.

Sunny was a wealthy man long before any of this happened, and as far as the community was concerned, I know I had a few favorite charities of my own I would go to Sunny about, and not only would he give you money, he'd give you a list of names to contact, and his charities were diabetes research and the cancer and Swim Across the Sound, things to do with St. Vincent's Hospital, and when he approached you, it was pretty difficult for you **[48]** to refuse him. And I only have good things to say about Mr. Lenoci. He's been a close friend of mine and I'm not sorry for the fact we've been good friends.

MR. DESIENA: I'm in the unusual position, your Honor, of being a lawyer who has had nothing to do with this case, with the defense, I'm a friend of Sunny's. I've been a lawyer for more than 40 years, although we've never met, I don't do much in the United States District Court, although I am admitted here.

THE COURT: Sir, could I have your name please.

MR. DESIENA: Charles—I'm sorry, your Honor, Charles Desiena. My office is in Fairfield. I'm sure you are happy to hear from another lawyer, but I'm going to try to—that's why I did write some things down because I didn't want to sound like a lawyer, I didn't want to speak like a lawyer.

He's got a very good lawyer, he doesn't need me for that, he just asked me if I would speak to you and plead for Lenoci.

I call him Al, my pal Al to be funny sometimes, but I asked him one day, being as everybody calls him Sunny, I didn't know if he was **[49]** comfortable with that, but everybody calls him Sunny, and I said "What is your name?" He said "Alfred." "What do you prefer to be called?" "Al." So, I and one other person I know call him Al. So, I refer to him as Al, and his son is Al, too.

But I remember my father—you know, much of this is cumulative rather than anything you haven't heard before because it's all the truth. My father once sold used cars, so he was enamored with that business, although he went on to other businesses after that, he was just a used car salesman, but he took me to see an example of a hard working guy on a used car lot, and maybe he bought a car from him, maybe he didn't, but that's when I first remember, that's my earliest recollection of Al, is seeing him hustling on the car lot, and in the best sense of the term, running around.

Our friendship has pretty much—it's about 30 years. I mean, I fast forward from there, if you can do that, and still be 30 years away from today, but I went my way and became a lawyer and he went his way and became a very successful person, and in a different way. So, our relationship is **[50]** really centered around Mill River Country Club in Stratford. They let me in there about 40 years ago and Al joined, as I said, about 30 years ago, and as a result of this he's not a golfer, I was a golfer, I've seen him all over these past 30 years on an average when we're not somewhere else, I take more vacations than he does, three, four, five times a week, and it always involves playing some cards, a lot of discussion, a bottle of water, a cocktail occasionally. Being a diabetic he doesn't drink that much.

I have actually seen him—incidentally, I heard a litany of his illnesses, which quite frankly some of them surprised me because he doesn't talk about that, he doesn't want to be thought of as something less than a healthy person. And he knows, he knows the consequences of having been injecting insulin in himself twice a day. I have actually seen him do it. So, that part of it I can certainly verify, and he's doing that for a long time, and I think your Honor might know what that means to somebody.

So, you know, as far as his genius, everybody has talked about that, and it's true. I can verify that because he's talking to me about **[51]** something, showing me something, I have no interest in it, I'm not going to be involved in it. Oh, if I didn't say so, I have never represented him. We're friends, and as I say, just a friend. Well, it's quite a big thing to have one friend. He has many, and I hope I have at least one.

He does have that ability that everybody agrees. He can—man, I wish I had it, you know. I don't have it, the vision to see something. He probably has a good idea what he'd do with this courthouse if he could knock it down. He might feel like that, he's come here often enough. But he has that ability to look at a factory building. I'm not sure about the accuracy, but I think it was the factory building, and turned it into Home Depot. That's in Fairfield, long before Bridgeport. And did I say it became—you know, became a Home Depot? Like he'll see mini-malls where there is a hot dog stand. He did that once where what was there for years was a very good hot dog stand.

Does he just do this by magic? He surrounded himself with people who trust him, architects, real estate brokers.

He can't be everywhere, although he does a damn good job at it, **[52]** if I may say so. Because he's in Norwalk and he's in—I'm not sure about Westport, Fairfield certainly, they call him Mr. Fairfield. He's not the number one taxpayer, General Electric Company is, but I think he's two or three.

And that's all, your Honor. Before, and it resonates in my ears, I would never go into Bridgeport. Let me say Bridgeport, I was born in Bridgeport, I was born on the east side of Bridgeport, I was born—I mean, I lived 10 years in the project that was Father Panik Village when it was called Yellow Mill Village from '41 to '51, my formative years, so to speak, and I still consider myself a Bridgeporter. I haven't lived in Bridgeport since 1964. I raised my family in Fairfield. I had my office in Bridgeport until six years ago when my young partner said "let's go to Fairfield" because he's a Fairfielder. And I still consider myself at heart a Bridgeporter.

I know, your Honor, I know from my own firsthand knowledge about the corruption in Bridgeport. That's been going on forever, from as long as I can remember. Now, some of it, yes, is hearsay. I've seen it because of some of the past corruption in that city, so I have to echo **[53]** Mr. Grudberg when he says this man, this friend of mine, did not invent or be the seminal cause of corruption in Bridgeport.

And again, my recollection is that he did several things there. I guess what has become a controversial Stop & Shop, not just because of what you heard, but because everybody was against it that seemed to be in the neighborhood, one of them a very close friend of my wife's, both work at the Pepperidge Farm, who said it's going to be the destruction of her and her condo, and, well, that didn't happen because you had a broken down dairy farm and now you have this quite attractive, as attractive as a supermarket can be, I guess it's a Super Stop & Shop, it's not one we shop in, but I have driven by it, it's beautiful. All of the property values there that people were concerned about have gone up for some reason, I guess it's because all real estate property values have gone way up from where they were before this horrible project was entered into.

The theaters, I forgot about those. My grandson just went off to one of them, the Bullard Theaters, which are the ones that he started to build and helped build and then sold it to somebody **[54]** else, but all of those things. And drive down or up—up or down to see it better when you are driving up Route 25 and you see Shaw's up there and Home Depot where I don't think there is anybody that would have known what to do up there.

There is not a big rush to develop things in Bridgeport. There is not a big—like he had to buy off competitors, this is like ludicrous. There is nobody there. There is nobody there that wants to. I think somewhere in here I've kind of gotten away from my notes.

There is somewhere in here about Father Panik Village. Well, your Honor, I would not—that's where I used to live. I wouldn't drive by there in the daylight, forget about it at night, but he had somebody he thought was ready to go there. Did he have to out bid somebody? Of course not. Nobody has done anything with it that was able to do anything with it before. There is like 46 buildings, something like that. As I recall, there were three story buildings that were leveled, and this is two full city blocks. I went to one of the schools a block away from there. Now you can't go back.

I know there is lot of neighborhoods **[55]** like that around the country, and indeed around Connecticut, but as I said, now you can ask the principals here this morning, nobody did anything with that. No. I mean, this idea that he had to do something, which he did do, that he had to do that in order to fend off and destroy competition, I don't believe it and I don't think that's what happened. I know that's not what happened.

I don't want to get involved in things that I don't know, but my recollection just from following things I read in the Connecticut Post every day, I don't like some of the things they have been saying about my friend, but I read it every day, and I get it delivered, I get it delivered to my home, and of all things, all of these different things, I don't remember all of the names of Steel Point and blah, blah, blah, these four big things around the harbor, they're going to do this, they're going to do that, talk, talk, talk, talk, talk, talk, talk.

And if you were at all interested in the City of Bridgeport, as I am, I had a little office thing there that I think another lawyer is there now, but I'm still interested. As I said, I'm a Bridgeporter. To me what's good for Bridgeport **[56]** benefits everybody. It's very important, the city of Bridgeport is very, very important, and hope springs eternal something is going to happen there.

The thing about that Steel Point and everything, man, I don't know, maybe I'm crazy, but I thought that Mr. Conroy, I wasn't going to mention his name, but his name was brought up, he failed. He was trying to get financing for years, two years, three years, I think three years, but it was done before I ever heard Al, my pal Al, Al Lenoci, Sr. ever talk about we might get this thing. It was dead. It was dead in the water.

That's my recollection, your Honor, and that's my honest—did you think I would get up here and lie to you? But that's my recollection. And I believe that to be the truth in spite of litigation. I had no part of this. I have never been to—he's invited me many times. He wants to show me his beautiful office. I have never gone there. I have no interest in seeing his office. He has never been to my offices either, either the one I had in Bridgeport or the one I have now in this little place in Fairfield. So, we don't have that kind of relation. We're friends, and that's the capacity in which I'm here.

[57] The other things is, you know, Jackie Berkowitz, we have different circles, but we know each other. I don't run around with Jackie and I have known Ira, but we don't have any discourse. I didn't talk to him about this case until six days ago. Last Wednesday afternoon Al asked if I would call him to let him know of my availability for this afternoon and, well, I'm on again, off again, on again. Fortunately my wife helped me type this out, I don't type, she typed it out, and here I am. That's why I'm here. And the only reason, I hope I can help. I hope something I say strikes a chord with, your Honor.

As far as his generosity, you see, to us if you read the papers, if you listen to the able U.S. attorney, I don't recognize that person, and it's not because he's telling me something I don't know like, he's not educating me, "see, this guy you thought was a great guy is not a great guy, he's a terrible person." No, I think he's got it wrong, I have it right. He's a good guy who fouled up and, as I said, Jackie said it very well. He didn't use any notes or anything, and I have the notes so I wouldn't ramble, and maybe I am just a little bit, but anyway, I can also confirm the **[58]** charities. You expect him to do, you expect somebody who has made a lot of money to be generous. St. Vincent's, American Diabetes, American Heart Association. Just about any organized charity or entity that needs money, that's to be expected. I don't even know if he deserves any credit for that, to be honest with you.

It's the other generosity, the generosity—I mean, you would say who at Mill River Country Club needs help? Well, your Honor, lots of people. And sometimes it's encouragement, sometimes, as Mr. Berkowitz said, referral to a doctor for some reason, he says, "Mention my name, they'll get you in there a little sooner." It's like the way the world goes round.

I've seen him, I mean, people coming up to him, could you help me with da, da, da, da, da. That again, I do that, too, on a smaller scale. You understand, if I can help somebody out, somebody needs something, they want a loan, I've seen him make loans where there is zero chance of repayment to acquaintances. Do you understand what I'm saying? And in many cases, I'm not talking about one or two, this is like a way of life, go to **[59]** people because he suspects they need some help, and not just financial.

There was a time—and the one thing that I like about him is, I mean, he's like me. I hate nursing homes. I hate hospitals. I wouldn't have been a doctor. You go because somebody you care about is there, and I've been through the mill, you know, I've lived long enough to have been through all of that. He goes when he doesn't really have to go, he could do what I do, make a phone call, but as much as he hates going there, as much as he hates seeing sick people, he does it, and he's unfailingly, as I wrote here, he'll unfailingly makes that unpleasant visit to a hospital to see a friend or acquaintance because it is the right thing to do and for no other reason.

And I think I've scribbled down a close here which I have here, your Honor, which was he's a good guy and I like him and definitely his friend and I believe him to be my friend.

Thank you, your Honor.

THE COURT: Thank you.

THE COURT: Mr. Lenoci?

THE DEFENDANT: Yes, your Honor. I'm not much of a speaker. I want to apologize to you, to **[60]** the City of Bridgeport, and anybody else I had any wrongdoings with. I've really been in jail for three years and can't sleep. Papers, the TV and the radio destroyed me. I get up at night and I drive to New York three, four o'clock in the morning, come home to try to sleep. There is nothing else I could say. I been in jail for three years. Thank you.

THE COURT: Thank you.

THE DEFENDANT: That's it.

THE COURT: Is there anything that needs to be added? I'd like to take a brief recess at this point.

Will the government have anything further when we come back from recess?

MR. APTER: No, your Honor.

THE COURT: Thank you.

(Recess).

THE COURT: Mr. Lenoci, will you please come to the lectern.

The Court has considered the lengthy arguments this afternoon with respect to how sentence should be imposed and what factors should be considered. The Court has granted the government's motion for a downward departure based **[61]** on his cooperation. The Court knows his cooperation was with respect to—largely to historical information, largely cumulative, and may have some additional information with respect to a potential tax miscreant. He did not testify before the grand jury or at trial, although he had agreed to testify about Mr. Schinella and regarding Pinto and Ganim. He met with the government once. He cooperated starting in September of '01.

Offsetting his cooperation, that has not been of a magnitude or importance as other defendants appearing before the Court, is the unfortunate reality of Mr. Lenoci's health, which is not good and which, therefore, means that a period of incarceration is more difficult. He faces a sentence without departure of 24 to 30 months. His conduct has been that of utilizing a genius for good and for bad. The testimony and investigation results show that Mr. Lenoci was everywhere and yet nowhere, almost like the Scarlet Pimpernel, you seek him here, you seek him there, you seek him everywhere. It's been hard to pin down exactly where his generosity has crossed the line, where his genius has been badly used, but it is quite clear both of those things have happened.

[62] It is, therefore, the sentence of the Court, of which part will be imposed today, that you be remanded to the custody of the attorney general for a period of 12 months and one day on Counts One and Two concurrently, and thereafter, you serve the first four months of supervised release in home confinement on electronic monitoring with you paying the cost of electronic monitoring.

Supervised release, concurrent on Counts One and Two, is for a period of two years. During that time you will perform 300 hours of community service for a non-profit in

Bridgeport that you have not yet contributed to in time or money. You will disclose to the probation office your financial records as requested and provide copies of tax returns as they are timely filed. Drug testing will be suspended.

There is no restitution applicable, and thus, the views on Bridgeport Harbor Place I and the city are rejected for reasons that I have previously articulated. There is something of an irony, but no dollars ever changed hands as a result of the corrupt agreements with respect to Steel Point, Father Panik and Car Tech. **[63]** Special assessment of $200 is imposed under 18 U.S.C. 3013. That will be payable tomorrow to the clerk.

MR. GRUDBERG: It has been paid today.

THE COURT: It has been paid.

Now, with respect to a fine, I'm not going to impose that today because I want further briefing from counsel on grounds that have not previously been considered by the sentencing commission, and I want to afford both sides the opportunity to give me the benefit of their analysis. The combination of factors that I am considering in an upward departure on the fine is where, as a result of the investigation by the government, a scheme, which would have netted substantial amounts of money, quantifiable or not, was not executed; and, two, where the defendant was willing to pay a sizable amount of money, something in the order of a half a million dollars, to corruptly influence Ganim, and thus derive the benefits that he thought he would get from those development projects. This is in the context of Application Note 5 to 2C1.1 which reflects that where there has been systematic, pervasive corruption of a governmental function, office or process that may cause loss of public confidence in [64] government, an upward departure may be appropriate. In this case, the corruption of a process of competitive bidding is what would be the focus of the analysis.

MR. GRUDBERG: If the Court please, Note 5 and? You went too fast for me.

THE COURT: Pardon me?

MR. GRUDBERG: Note 5.

THE COURT: Application Note 5, 2C1.1. it sets out the basis for an upward departure.

MR. GRUDBERG: Concerning the first thing your Honor mentioned, as a result of investigation, can we address that factually also?

THE COURT: You can address it any way you want, but it's a scheme interrupted that otherwise would have netted substantial amounts of money and a willingness to pay substantial amounts of money to influence and corruptly obtain that huge benefit. I do not think I find anything in the guidelines that tells me that the sentencing commission has considered that situation.

May I have your briefing by Monday?

MR. GRUDBERG: If the Court please, I'm on trial in Meriden and will be for the rest of the week. Obviously I'll have someone else working on [65] this.

THE COURT: Tuesday.

MR. GRUDBERG: Okay.

THE COURT: Tuesday the 29th, and we will need to advise of you when the completion of the sentencing will be, which will require Mr. Lenoci to be present unless he—

yes. All right then, otherwise if I do not depart upward, I will impose a fine at the maximum of $50,000, and that is to be paid in 30 days.

Mr. Lenoci certainly is eligible for voluntary surrender. Are there any factors bearing on when he should be directed to report?

MR. GRUDBERG: The issue that Mr. Gulash raised yesterday, I don't know whether these things could be seriatim or what, but one of the things may be the briefing schedule and so forth, or they'll be looking for designation immediately without regard to the fine, I take it?

THE COURT: Right, I'm going to assign a reporting date of September 3rd. If there are matters that—specific matters that can be brought to the Court's attention with respect to some reason why that should be postponed, I'll take those into consideration, while I recognize this sentence is not **[66]** yet completed, and thus, we will complete sentencing on Wednesday July 30th at four o'clock.

Your right to appeal, Mr. Lenoci, you must file your notice of appeal within 10 days of the imposition of sentence, which will be completed and thus will run from July 30th. If you cannot afford the cost of the appeal, you may proceed in forma pauperis and the clerk will file the notice of appeal for you. If you cannot afford counsel for your appeal, the court will appoint one at no cost to you.

Is there anything that I have not ruled on that requires ruling? Anything I have not been clear on that requires clarification? Anything that I need to add?

Let me just at least add for the time being to complete, that the mandatory conditions of supervised release include you shall not commit another federal, state or local offense. The fine imposed and not paid prior to supervised release becomes a condition of supervised release, and the standard conditions you will get a copy of.

Anything from you, Mr. Grudberg?

MR. GRUDBERG: No, your Honor.

THE COURT: From the government?

MR. APTER: No, your Honor.

[67] THE COURT: Probation?

PROBATION OFFICER MAXWELL: No, your Honor.

THE COURT: Thank you very much. I am sorry that we can't conclude the entire sentencing today, but the issue with respect to the government's request for an upward departure are issues which the Court will consider, the absence of actual loss or benefit, and that requires this extension.

We stand in recess.

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Date

Official Reporter

[1] UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Case No. 3:01CR252 (JBA)
July 30, 2003

UNITED STATES OF AMERICA,

VS.

ALFRED LENOCI, SR., ET AL

Before:

THE HON. JANET BOND ARTERTON, U.S.D.J.

APPEARANCES:

FOR THE GOVERNMENT:
UNITED STATES ATTORNEY'S OFFICE
157 Church Street
New Haven, Ct. 06510
BY: MICHAEL SKLAIRE, ESQ.

FOR THE DEFENDANT ALFRED LENOCI, SR.:
JACOBS, GRUDBERG, BELT & DOW
350 Orange Street
New Haven, Ct.
BY: IRA GRUDBERG, ESQ.

FOR THE DEFENDANT ALFRED LENOCI, JR.:
GULASH & RICCIO
350 Fairfield Avenue
Bridgeport, Ct.
BY: JOHN GULASH, ESQ.

Sharon Montini
Official Court Reporter

SENTENCING TRANSCRIPT

VOLUME II

[2] THE COURT: Good afternoon. Please be seated. We are here for the continued sentencing hearing in United States v. Alfred Lenoci, Jr.

MR. GULASH: Good afternoon, your Honor.

THE COURT: Good afternoon.
All right, Mr. Gulash, would you—good afternoon, Mr. Lenoci.

DEFENDANT LENOCI JR.: Good afternoon, your Honor.

THE COURT: Do you want to set out the particulars of your motion?

MR. GULASH: Yes, your Honor, just very briefly. I will stand on my argument to the Court previously advanced and supplemented by my submission asking the Court for a recommendation of placement in intensive confinement. In relation to my client, I will stand on my arguments previously advanced, combined with the supplemental request, your Honor, and the only other thing I would say is that obviously that even if your Honor made the recommendation requested, it still would be ultimately up to the Bureau of Prisons to theoretically accept or reject, I'm sure respectfully, but they wouldn't blindly defer to your Honor's recommendation, but rather that would be one [3] factor for them to consider as well as others as to whether or not he would be considered an appropriate candidate.

So, I would respectfully ask your Honor to recommend the placement. Other than that, your Honor, in terms of a surrender date, I would ask if the Court would consider deferring decision on that until after the Alfred Lenoci Sr. matter was addressed by your Honor, and that finally—if I could just have one moment, your Honor.

THE COURT: Yes.

MR. GULASH: Your Honor, I would just add one other thing, and that is that I would move that the Court, in connection with the order as it exists regarding the fine, be altered to be that the—that it basically be cut into two parts, namely that a fine in the amount of $278,700 be paid within 90 days and that a separate $278,000 be deposited with the Court in an account designated by the Court, and that request I believe, your Honor, is not opposed by the government.

THE COURT: All right, does the government want to be heard with respect to any of the three matters that Mr. Gulash raises?

MR. SKLAIRE: Just briefly, your Honor, [4] if may do this from counsel table. The government does not oppose the matter of the fine as set forth and as discussed with the Court. The government would defer to the Bureau of Prisons as to the placement of Mr. Lenoci Jr., to which camp or facility they designate, and the government would oppose any modification to the date of surrender as to Mr. Lenoci Jr.

MR. GULASH: And again, I would just ask, I defer any remarks on the date until after Mr. Lenoci Sr., and, your Honor, one thing I neglected to say, and that is depending on your Honor's ruling regarding the recommendation of placement, if your Honor denied my request, I would ask that your Honor make a recommendation that he be placed in a camp in the northeast region. The Court has at least observed in other cases that is becoming more and more difficult as a placement based upon other defendants, and just that if in fact there was not a placement within the northeast region, I would ask if the Court would consider at least a recommendation to the camp in—I think it's the Folger Camp, which is in Florida, your Honor. At least it would be on the east coast.

With that, your Honor, I would ask if I [5] could wait until after the Lenoci sentencing on the staggering issue.

THE COURT: The staggering issue?

MR. GULASH: The staggering issue of the sentences, yes, your Honor.

THE COURT: All right, then, for the first part, the proposal that Mr. Lenoci has made by which a $278,000 escrow account is set up in the clerk's office for distribution to nonprofit organizations in Bridgeport with the remaining amount of $278,700 as a fine makes perfect sense to the Court in the context of this case in particular. This has been Mr. Lenoci Jr.'s idea, it is nothing that is opposed, it is unopposed by the government, and the Court has certain criteria that will be imposed as a condition. Any contribution—the contributions that are made from this escrow account will be made anonymously, no one will know who—no one will know from whence they came. The money will be set up in an escrow account in the clerk's office immediately.

MR. GULASH: Yes, your Honor.

THE COURT: It will be an interest bearing account. I will appoint a special master who will make the recommendations to the Court of where **[6]** those funds should be distributed to. I will seal the identification of the special master appointed in order to ensure confidentiality and anonymity. The Court will not be making the determination on which organizations get the money, which will be distributed within 90 days, but the Court will set certain criteria, namely that it be a Bridgeport nonprofit, that it be one that has been severely impacted by federal and state budget cutbacks, and that it be an organization whose purposes and function is to serve the most needy of Bridgeport's citizens.

With that in mind, and with those criteria, the proposal of Mr. Lenoci Jr. is accepted, the fine that will be entered, which must be paid in 90 days, is $278,700, and that finalizes that.

With respect to the judicial recommendation for a place of confinement in the intensive confinement center, the Court at this point will decline to make that recommendation for the following reasons: Following your motion I went back and read the letters that were submitted on behalf of Mr. Lenoci which attest to his professional and personal qualifications, including several that specifically indicated how his competencies have **[7]** enabled others to learn from him as a soundingboard and has assisted others in their professional success, and that the physician who has offered his opinion is one that also notes Mr. Lenoci's successful work history and lack of criminal record, identifying low self-esteem as a problem with respect to the treatment and therapy with which he has begun again. I believe that can be dealt with in a variety of contexts and programs and does not overall, in my view, fit what is the intent and purpose of the—I didn't mean the intent and purpose, the greatest needs served by the intensive confinement center.

So that while the program is generally to benefit those who have a poor work history or no work history, have a criminal record and need the structure and discipline to functionally organize themselves if they're to embark on a law abiding career, Mr. Lenoci does not possess those characteristics. While his emotional and other characteristics may benefit from that, it seems to me that the initial determination of the limited room that exists, the limited enrollment in that program should be made initially by the Bureau of Prisons knowing who would be best served by it, and if there is room and if the Bureau of Prisons does, upon Mr. **[8]** Lenoci's application, accept him for that program, the Court will give its recommendation and approval.

I think we will then defer the report date issue.

MR. GULASH: Please, your Honor.

THE COURT: Until I hear from Mr. Lenoci Sr.

MR. GRUDBERG: Concerning the issue of the fine, does your Honor wish to hear from us or the government first?

THE COURT: Let's hear from the government because I have your brief most recently, and I'd like to hear the government's response to that. You raise a number of issues that are interesting and need to be addressed.

MR. SKLAIRE: Your Honor, Application Note 4 reflects that an upward departure is warranted when the seriousness of the offense is not adequately reflected in the fine, and that's what the government submits here. As was stated during the allocution at sentencing, as reflected in Application Note 5, the conduct of Mr. Lenoci, Sr. reflected the systematic and pervasive corruption causing the loss of public confidence in government, and I'm referring to the agreements with Mr. Pinto and Mr. Ganim, with the **[9]** other matters brought to the Court's attention at the time of sentencing.

The testimony that Mr. Pinto gave at trial, during the trial of Mr. Ganim, was that the dollar a square foot deal was for any project that came along. It was for any development that the Lenocis, Mr. Lenoci Sr. and Jr. and their company would get in the City of Bridgeport. This is not a single improper offer of a bribe as reflected in counsel's papers, nor was it based upon pressure from Mr. Pinto, as indicated in the papers. This was an agreement to pay for developments in the City of Bridgeport.

THE COURT: How does the government mesh that argument with the provisions under the guidelines under 2C1.1(2)(A) which could have been used and which would have then used the measurement of the fraud guidelines for a loss determination which would then drive the fine level?

MR. SKLAIRE: I mean, it gets—

THE COURT: You didn't use that.

MR. SKLAIRE: That is correct, we would get to the number, the government submits, in that we get to the intended loss, or we're using the bribe number, and in this case the most practical number is **[10]** the 300 and—I think three hundred fifty to five hundred thousand—three hundred thousand to five hundred thousand dollar range in terms of the bribe. Either way, or in the alternative, the government would—the alternative fine is a $250,000 fine, and using the fraud guideline it appears that we—that number, that three hundred to five hundred thousand dollar number is the reasonably foreseeable number that was used in the dollar a square foot deal. The issue that counsel makes in his memo is concerning that this wasn't systematic and pervasive, and that is not what the record reflects. So, either way the government submits you get to that number that is higher than the guideline range.

THE COURT: If you're looking at the sentencing provision application note that details that the fine range of the guidelines is generally expected to be twice the gross gain or twice the gross loss, but loss has not been a calculation used to drive these guidelines, how is it that you can say that this is outside the heartland of what is provided for under 2C1.1(b), that is, increasing by eight levels for making a payment to an elected official? The fraud guidelines go all the way up to losses of more than $80 million. So, my question is, **[11]** why should we say that Mr. Lenoci's potential gain or intended gain from this is outside of a heartland that was contemplated by the guidelines?

MR. SKLAIRE: Well, the government would submit that the heartland does not account for what's referred to in the application note as the ongoing systematic nature of this. This is not just one bribe, this is not just one payment, that what occurred here was an ongoing relationship that a dollar a square foot for every deal, along with the other influences which was reflected in the court—in the government's papers and at sentencing, which the Court is aware of, that the guidelines did not account for this ongoing relationship, that it accounted for a specific pay for a specific result.

THE COURT: We had two counts of conviction, one is a bribe of Ganim and one is a bribe of Trinkley.

MR. SKLAIRE: That is correct.

THE COURT: Why is that—why does that not adequately reflect the nature of the bribe?

MR. SKLAIRE: Because based upon—let me find the exact language. The evidence that—the evidence that the government had concerning when Mr. Pinto testified at trial and the evidence that was **[12]** submitted to the Court in its papers, the relationship between Mr. Lenoci, Sr. and the corrupt officials was part—this was pervasive corruption. This was a system, again, where you had to pay to play. This was an ongoing system where these individuals paid to get what they wanted to develop in the City of Bridgeport, and it dated back years before that, and included other meetings and other situations between the Lenocis and Mr. Ganim, and I submit that Application Note states it exactly, that this is beyond—this is not the heartland, this is not a payment for a project, this is part of a system.

The case cited by the government in its papers, United States v. Bonventre, at 824 F.Supp 328, refers to the defendant's actions destroying confidence in the honest and impartial service of the officials. In that case the Court fined the defendant in the range of what would have been the payoff to the public official, and it would seem that the same situation applies here in this case.

THE COURT: All right.

MR. SKLAIRE: Thank you.

THE COURT: Mr. Grudberg.

MR. GRUDBERG: Thank you, your Honor.

[13] THE COURT: We are now moving to U.S. v. Alfred Lenoci, Sr. 01cr252. Mr. Lenoci is also here. He need not stand up if it's more comfortable sitting down. I just want to hear this argument, that's legal argument on this issue of the fine.

MR. GRUDBERG: If the Court please, I don't have a lot to add to our memorandum which I think is fairly complete. A couple of things, though. There were some factual things that I was not sure of that I'd like to add at this point. It is clear, and I wasn't sure when I wrote it because it was done at the last minute, but it's clear even from the presentence report and from the government's evidence that the activity of Mr. Trinkley leading to the application for the money from the state department was taking place in 1998. That was a better part of a year prior to the one dollar per square foot offer. I've checked with my client. He checked with sources in the City of Bridgeport today. It is my understanding that they were awarded the preferred developer status, or whatever they call it, in 1996, about three years prior to the offer of one dollar per square foot.

My recollection was the Court asked us to brief the two things, one the pervasive thing, and **[14]** the second, what if, where you have no payments made, and that's clear, what if factually the thing that prevented the project from going forward was government intervention and can you then look at what they would have made.

It seems to me factually there is zero support for a thesis that the government intervention—the search warrants and so forth were in December of 2000, as I recall. Obviously the Father Panik Village thing not only had been awarded prior to, long prior to the one dollar per square foot offer, but it had pretty much folded up by then. By sometime in 1999 they lost their tenant, they could not go forward and the property sat.

As a matter of fact, I can tell the Court I just learned this today, that about a year ago, even though legally they still had the status, the city asked them to, if they would, in effect, give the property back. There had been later on executed a 99-year ground lease. Voluntarily they did that. That's a year or more ago.

The fact is we are here almost three years after the government intervention. That project was in deep freeze before. All they did on that was lose a quarter of a million dollars in **[15]** attempting to go forward on Father Panik. The fact is, it's a terrible neighborhood, it always was a terrible neighborhood, and they couldn't get a tenant, and it's still totally on hold. They do not have a new developer. As I understand it, they're talking about building a church there now. So, the thesis that somehow just because an offer was made to pay back-end, they would make big profits, just doesn't hold water.

As to the other properties, I mentioned in one of my footnotes this, it is my understanding that the Car Tech property has huge, massive problems with the environment. That has never been given to anyone. Going to Steel Point, a thesis can be made, although I don't think it's backed up, that when the City of Bridgeport finally terminated the Conroy interest in early 2001, a thesis could be made that the reason was, why the Lenocis didn't bid on it at that time, was because of the investigation. No evidence of that, but theoretically you can say that.

On the other hand, the fact is that it is now two years plus since then, they do have a new developer. The most recent things in the newspaper indicate that as of May of 2003, more than two years later, the state has committed itself to spend **[16]** $900,000 for an environmental study that could make or break plans to develop Steel Point. The present developer indicates that he thinks the remediation on the property would be in the neighborhood of $110 million. Conroy is quoted as saying that he thought it would take another $100 million.

I just think this is so speculative that anybody would have made money on any of these things. There is no factual basis for it and there is no factual basis for the thesis that the government stepping in prevented it. It's quite clear that Car Tech may never get developed, and the problems with Harbor Point—Steel Point, are so massive that that may be the case also, and if it isn't the case, it will probably be a totally different project. I'm not sure how much of it will need remediation, where it needs remediation and so forth.

For the Court to say that they would have made $300,000 or $500,000, or any figure, if the government hadn't in fact announced its investigation, has absolutely no support in the record, and as I indicated, if there is any issue about any of these factual things, we would request a hearing on it. And the government just says that three times in its brief memorandum, it says that **[17]** "due to the onset of federal investigation," on page one. On page two they say it twice "due to the intercession of enforcement authorities" "what would have been done but for the intervention of federal authorities." There is nothing in the record. I didn't sit through the whole trial, but there is nothing there.

Moving onto the second issue that the Court asked us to address ourselves to, we briefed it.

THE COURT: Your position is that that guided upward departure reflects where that—the defendant's conduct has character being systematic or pervasive.

MR. GRUDBERG: All the cases we could find indicate that. I don't think that—I mean, our view of the evidence, our view of what happened is that after some years of being hounded for political contributions for Mayor Ganim, and his brother on one occasion when he was running for probate judge, the Lenocis said, forget that, we'll give you a dollar a foot for after-developed property and so forth.

Now, to say that that's continuing—first of all, it's not an agreement, it's an offer, **[18]** but they committed it if something happened and if they were able to develop something they would pay the bribe, but it still doesn't turn it into anything other than a single offer. Just because it may have possibly involved lots of properties, Mayor Ganim might have been mayor for another 10 or 15 years, or he might have run for governor. You know, I just don't think you can expand that and say that it's continuing and pervasive, systematic or pervasive when it's just one offer.

And all of the cases are far, far different from this situation, and to say that this single offer, whether it might have applied to more than one property, none of which came through, no bribes were paid, it was offered on a basis where if they finished the property and it never happened, everything would seem to lien in favor of the fact that on a couple of these pieces of property it was never going to happen, and unfortunately for the City Bridgeport, it may never happen.

So, I don't see how on this one thing you can say it's systematic or pervasive corruption. The government function—it's quite clear that the government function in Bridgeport was apparently, according to Mr. Pinto, corrupt long before the **[19]** offer, and just because the Connecticut Post took the Lenocis to task in an editorial, I don't think it had very much to do with losing faith in the government in the City of Bridgeport. That was done by people who came to the Lenocis looking for money in lots and lots of ways, and while what my client did is criminal, I don't see how you can say that it is what made the City of Bridgeport corrupt.

And for all the reasons your Honor questioned about, it just seems to me that our brief, that this is in the heartland, is right on point.

THE COURT: Anything further from the government?

MR. SKLAIRE: No, your Honor.

THE COURT: The sentencing guidelines with all of their strictures lead us in certain paths and cause us to analyze conduct sometimes in rather dissected or truncated ways. I'm satisfied that the sentencing guidelines for the two offenses to which Mr. Lenoci pled guilty have the capacity to reflect losses or intended losses or gains or intended gains, and that analysis—up to and much further than that which was contemplated as a best case scenario for the Steel Point and/or Father Panik and/or Car Tech properties. So, with respect to that aspect, we **[20]** haven't a loss under the guideline analysis for which the fine is not in the proper perspective, that is twice the gain or loss, because that's not the analysis that's applicable to these two offenses.

In addition, and probably why we have used a different analysis, is because that numerical determination is so difficult to make. It would require a hearing. It is, probably at the end of the day, as Mr. Grudberg says, just too entirely speculative given all of the factors that come into play in these large development projects.

So we turn our attention to what the government alternatively argues, which is whether the defendant's conduct is part of a systematic or pervasive corruption of a governmental function, process or office that may cause loss of public confidence in government, under which circumstances an upward departure may be warranted.

There is no doubt that the conduct of Ganim, Grimaldi and Pinto was systematic and pervasive in corrupting governmental functions, processes and offices, but as to Mr. Lenoci's conduct, he bribed Mr. Trinkley, he offered to bribe the mayor, and thus, I can't find a factual basis that would warrant an upward departure that Mr. **[21]** Lenoci's conduct was a part of the systematic and pervasive corruption other than the fact that it was, on Count One, a bribe of those who were engaged in that conduct which may cause and has caused loss of public confidence in government. With that gloss put on Note of 2C1.1, I'm going to decline to depart upward on the fine and impose a fine of $50,000 payable in 90 days.

Now, Mr. Grudberg, I have looked quickly, since I just received it, at your motion for release pending appeal.

MR. GRUDBERG: Yes, your Honor.

THE COURT: And you tell me that the ground for appeal is the decision not to group.

MR. GRUDBERG: That is correct.

THE COURT: How in the context of a generous downward departure from what the guidelines would be can that issue be said to warrant a release pending appeal where the sentence that was imposed was imposed with respect to his health, his cooperation, and bears no relationship to the sentencing range whose calculation you dispute?

MR. GRUDBERG: Well, if the Court please, I had a similar situation before Judge Thompson some years ago, it involved a much longer sentence, so **[22]** there was no issue of release on appeal because clearly we were going to be heard in time, but that was a situation where Thomas Richardson, the attorney I represented, had actually—we had gone to the government, the whole thing, Carrozella thing, 13 million dollars and so forth, and there were disputes about sentencing guidelines and so forth, and Judge Thompson held against us in a couple of cases, a couple of instances. We took the appeal. The Court of Appeals reversed him on some of those, came back because, you know, if you start with a guideline of 24 to 30 and you go down to a year and a day, it may be very different from starting with 18 to 24 and what you do for his health and so on and so forth.

THE COURT: You mean where they overlap?

MR. GRUDBERG: They don't overlap. 24 to 30 doesn't overlap with 18 to 24.

THE COURT: Yes, it does, the 24.

MR. GRUDBERG: Well, okay. Yeah, then I will answer that yes, even where they overlap, because I don't think there is a single case that your Honor has sentenced where you didn't give, for whatever combination of reasons, mostly cooperation, at least 50 percent off the low one.

THE COURT: That's actually not accurate, **[23]** but it is also not a part of the record.

MR. GRUDBERG: But it just seems to me that if in fact you start at 18 to 24, I don't know whether the Court would see fit to only give a six-month break for everything. You know, his cooperation wasn't as much, but, you know, his behavior wasn't nearly as bad as Pinto or some of the others also, including his son, and I think that in terms of the fact you did depart, if one starts six months lower, there is a reasonable thesis that you might have given him a lower sentence.

Now, you know, you didn't say, "without regard to my ruling on the issue of grouping and so forth this was going to be my sentence anyway," and perhaps if you had I would agree with your Honor, but the fact is that if a base—based on a 5K1, if we are already starting—if we're starting at 18 to 24 rather than 24 to 30, I think it's a reasonable thesis that if your Honor was wrong and they sent it back, you might not give the same sentence. There is nothing in the record that would indicate you would.

Under the circumstances, since it is such a short sentence, relatively, I know we like to get into the Court of Appeals as quickly as possible, but it seems to me under those circumstances it is **[24]** reasonable, especially since you have problems with potential staggering anyway, and he's clearly not a risk of flight, I think the issue is pretty clearly a serious issue, not only I, but an experienced member of the court staff, the probation department, felt that they should be grouped, and so it's not a useless issue.

THE COURT: What about the alternative outcome if they had not been grouped, then there would have been a two-level increase elsewhere?

MR. GRUDBERG: But there wasn't.

THE COURT: Well, that's because they weren't grouped. I'm just trying to remember and understand why you think the outcome would have been any different grouped or not grouped.

MR. GRUDBERG: The fact is that if, in fact, we come back here and—I mean, I disagree with the fact that because there are two victims, and I don't think they're victims in some ways, but your Honor can rule on it, I mean, I'm not saying that it's impossible for you to reach that issue if it comes back.

THE COURT: I'll hear from the government.

MR. SKLAIRE: Your Honor?

[25] THE COURT: Did you want the opportunity to brief this?

MR. SKLAIRE: We have not had the opportunity, and we would be happy to file something. I'll just say the one thing that hasn't been raised is substantial likelihood that the defendant would prevail in the Court of Appeals, and I believe that the Court was proper in grouping—in not grouping these two counts based upon the two separate bribes that were paid. I mean, factually speaking, I think that the government would prevail in the Second Circuit on this issue.

So, the issue of whether there is a substantial likelihood that the outcome would be different is—well, the government submits legally not there, and then factually, the fact that the government had filed a 5K and the Court granted the government's motion for a downward departure and there were further departures based upon health and other reasons, that the odds are, and that's what we are talking about here, that the outcome would be no different than it is, and, therefore, we would oppose the defendant's motion. However, the government would be happy to submit on paper a response to this.

MR. GRUDBERG: If the Court please, I **[26]** don't think that's the issue as to what the odds are. We have cited the case law. We're not asking your Honor to say "yes, I made a mistake and I'm going to get overruled." And that's not the issue. On the other hand, the issue is whether it's a serious question, and if we're right, do we have a reasonable chance of success, and I think that's so, with all due respect to your Honor.

THE COURT: But doesn't the difference in the outcome which was going to be no different bear on this?

MR. GRUDBERG: Well, you say that now, you didn't say that last week, and I can tell you that it did make a difference of four to six months in front of Judge Thompson when we went back. I'm not saying that your Honor couldn't get your tail up in the air and say "I don't care what the Second Circuit says, I'm going to give the same sentence," you are still the Court and it clearly would be a departure, it would be a five month and 29 day departure. So, perhaps you could. On the other hand, the record up until now when we are talking about appealing has not been that you are going to give the same sentence.

THE COURT: I think under the context of **[27]** all of the defendants, except the one who went to trial, having been given 5K1.1 motions, allowing the Court to then fashion an appropriate proportionality belies the possibility that there would have been any different outcome. But I'm going to let the government brief this.

MR. GULASH: Can I just interject?

THE COURT: Yes.

MR. GRUDBERG: Counsel, you know, we do have a problem concerning both of them being away at the same time, and without regard to whether it's on appeal and whether it might be reversed, the companies are attempting, notwithstanding problems with financing and so forth, with banks, to keep things going, attempting to continue to do some developments, usually involving someone else as a partner, and if—without regard to the appeal, my understanding is there is a bunch of stuff that's going to be going on this fall that they absolutely need one of them there, and if the Court would allow Mr. Lenoci Sr. to surrender himself six months after his son, that takes care of it without regard to release on appeal.

And I know there has been discussion in chambers, but aside from reading the newspapers, I **[28]** can tell the Court it's my understanding that Mr. Schinella hasn't had anything to do with running any of—either United Properties or any of the other separate limited partnerships or entities, separate properties since 2000, since shortly after the thing came up, and there is significant estrangement there and he's had nothing to do with running either the golf course or the businesses, and few of—you know, they have a bunch of employees. It's important, if the Court please, even though there will be some overlap. The next six months I understand are important, and if my client, without regard to the appeal, could surrender six months after his son that would be very helpful to the companies, its employees and their ability to do business.

MR. GULASH: Your Honor, permission?

THE COURT: One moment, let me finish up the issue of bond pending appeal. Could I get the government's memorandum in very short order?

MR. SKLAIRE: I'll have to try to get it to you. I understand your Honor wants something by the end of the week. I'll try to accommodate the Court. If there is a problem, I'll let the Court know. We'll try to get something to the Court. Your **[29]** Honor is out Friday or—

THE COURT: Next week.

MR. SKLAIRE: So if we got you something by Friday of this week. That will be two days from now.

THE COURT: His report day is not until September anyhow, right?

MR. GULASH: That is correct.

THE COURT: So we really are not under such a rush.

MR. SKLAIRE: Okay. Thank you, your Honor.

THE COURT: So, let me have it by the 8th.

MR. SKLAIRE: Very good.

THE COURT: All right, Mr. Gulash, I have a question.

MR. GULASH: Very brief, your Honor.

THE COURT: I have a question. When does the golf course close?

MR. GULASH: My understanding, depending on weather, but I think—

THE COURT: Ask your client.

MR. GULASH: The end of Thanksgiving with the golf part of it, your Honor. I understand there is **[30]** a separate part that goes year-round, and there is the restaurant. The actual golf course, your Honor, they figure the end of Thanksgiving, right after Thanksgiving.

Your Honor, what I was going to—just for the Court to know, just to the extent it would in anyway impact upon your Honor's thinking on the subject, that balancing between the issue of my client preparing for sentencing versus the running of the company, in the short run, as with both principals being absent, at least what's been represented to me by my client, to the extent the Court considers staggering at all an order, my client would openly defer and represent to the Court that his father, at least as far as what's going on right now, is more the principal than he as far as to the extent that efforts are being made to continue the business, and that has to do with the real estate development aspect of the business, and Attorney Grudberg certainly advised the Court as to problems in that regard, but not completely giving up and folding up their tent, so to speak, that his father, at least as far as in the short run, he certainly defers to his father as being the more essential member of the team.

[31] And to the extent that at least the suggestion that a staggering that had my client starting, for example, on the tendered date of the father, which was the September 3rd date, it might—and that presumably Attorney Grudberg proceeding with, in fact, if there was an appeal, with as much dispatch as possible, it might make academic the issue as to whether or not there would be the technical beginning of a suspension of the commencement of the sentence until the resolution of appeal, if the staggering is simply that the father's date was changed to a later date and the son's was the first date, and therefore, the two birds with one stone, namely that the father at this more critical time, as both would otherwise be leaving, if one could stay for a period of time for the transition, it would make more sense it be the father.

THE COURT: When currently is Mr. Lenoci Jr. scheduled to report ?

MR. GULASH: There was no date set. There was the date of September 3rd in relation to his father, your Honor, but as far as, you know, given the choice or druthers, so to speak, to the extent staggering makes sense under the particular facts and circumstances of this, what I think the **[32]** Court would—at least wouldn't dispute is it's more of a family run business, to the extent, if the Court agrees, it would make some sense to allow some staggering, and although I've asked in my request that it be a seven-month delay, certainly any staggering, your Honor, and I would, to the extent that—anything less I would ask for the Court to consider six-month staggering as in it would seem to accomplish Attorney Grudberg's goal as it relates to an appeal, accomplish the goal my client's most concerned about, and that is that smooth transition of the company, dad being the principal partner, if you want to say, is certainly the one to which he would defer to his expertise as far as being able to best run it during that initial crisis period, your Honor, and I say crisis as in Paul is certainly involved and will continue to be involved, but his father could help him the most, your Honor.

THE COURT: I'll hear from the government.

MR. SKLAIRE: Just briefly, your Honor. The defendants have used this company to bribe public officials from the state and from the City of Bridgeport, and they've been able to continue working throughout the time that this case has been pending, **[33]** and to provide special accommodation so they continue working in this period, to allow one to be out while the other is in, just defies the purpose of punishing them and deterring others from engaging in this activity, and the government would oppose any such accommodations.

The company is viable. The company can run. They have people to run their projects, they have people to run the golf course. To stagger the sentence so one of these two individuals who have committed these crimes using this company to stay out to continue running their company, just it's something that the government would have to oppose, your Honor.

THE COURT: All right, I'm going to set a September 3rd date for Mr. Lenoci Jr. As Mr. Gulash points out, if Mr. Lenoci Sr.'s motion for bond pending appeal is granted, that accommodates your request, and if not, we'll—

MR. GRUDBERG: We'll be heard again later.

THE COURT: I will assume that I will hear from one or the other of you in a further motion to modify the report date.

MR. GRUDBERG: Thank you.

[34] THE COURT: All right, does that then conclude all matters that were pending on these two cases?

MR. GRUDBERG: I think so, your Honor.

MR. SKLAIRE: Yes.

MR. GRUDBERG: Other than what's deliberately left open right now.

MR. GULASH: I was asked to remind both the government and Attorney Grudberg I made a request that my client be permitted to go to New Jersey. Your Honor will grant it?

THE COURT: Yes.

MR. GULASH: He returned, and he was asked if they would be able to return until this weekend, your Honor. Originally it was a family affair that they came back as of—I think the day before yesterday, but they wish to rejoin the family until August 3rd, if the Court would allow.

THE COURT: Assuming that all the same conditions remain in place, I have no problem.

MR. GRUDBERG: Fine, your Honor.

MR. GULASH: Thank you.

THE COURT: Thank you then very much, we stand in recess

---

[35]

[36] I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Date

Official Reporter

APPENDIX C

USSG § 3D1.2 GROUPS OF CLOSELY RELATED COUNTS

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

(a) When counts involve the same victim and the same act or transaction.

(b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are to be grouped under this subsection:

§§ 2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1;
§§ 2C1.1, 2C1.2, 2C1.7;
§§ 2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;
§§ 2E4.1, 2E5.1;

§§ 2G2.2, 2G2.4;
§ 2K2.1;
§§ 2L1.1, 2L2.1;
§ 2N3.1;
§ 2Q2.1;
§ 2R1.1;
§§ 2S1.1, 2S1.3;
§§ 2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1;

Specifically excluded from the operation of this subsection are:
all offenses in Chapter Two, Part A;

§§ 2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3;
§ 2C1.5;
§§ 2D2.1, 2D2.2, 2D2.3;
§§ 2E1.3, 2E1.4, 2E2.1;
§§ 2G1.1, 2G2.1;
§§ 2H1.1, 2H2.1, 2H4.1;
§§ 2L2.2, 2L2.5;
§§ 2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3,
2M3.4, 2M3.5, 2M3.9;
§§ 2P1.1, 2P1.2, 2P1.3.

For multiple counts of offenses that are not listed, grouping under this subsection may or may not be appropriate; a case-by-case determination must be made based upon the facts of the case and the applicable guidelines (including specific offense characteristics and other adjustments) used to determine the offense level.

Exclusion of an offense from grouping under this subsection does not necessarily preclude grouping under another subsection.

USSG § 2C1.1 OFFERING, GIVING, SOLICITING, OR RECEIVING A BRIBE; EXTORTION UNDER COLOR OF OFFICIAL RIGHT

(a) Base Offense Level: 10

(b) Specific Offense Characteristics

(1) If the offense involved more than one bribe or extortion, increase by 2 levels.

(2) (If more than one applies, use the greater):

(A) If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest (i) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (ii) exceeded $5,000, increase by the number of levels from the table § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(B) If the offense involved a payment for the purpose of influencing an elected official or any official holding a high-level decision-making or sensitive position, increase by 8 levels.

(c) Cross References

(1) If the offense was committed for the purpose of facilitating the commission of another criminal offense, apply the offense guideline applicable to a conspiracy to commit that other offense if the resulting offense level is greater than that determined above.

(2) If the offense was committed for the purpose of concealing, or obstructing justice in respect to, another criminal offense, apply § 2X3.1 (Accessory After the Fact) or § 2J1.2 (Obstruction of Justice), as appropriate, in respect to that other offense if the resulting offense level is greater than that determined above.

(3) If the offense involved a threat of physical injury or property destruction, apply § 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) if the resulting offense level is greater than that determined above.

(d) Special Instructions for Fines—Organizations

In lieu of the pecuniary loss under subsection (a)(3) of § 8C2.4 (Base Fine), use the greatest of (A) the value of the unlawful payment; (B) the value of the benefit received or to be received in return for the unlawful payment; or (C) the consequential damages resulting from the unlawful payment.

USSG § 2C1.7 FRAUD INVOLVING DEPRIVATION OF THE INTANGIBLE RIGHT TO THE HONEST SERVICES OF PUBLIC OFFICIALS; CONSPIRACY TO DEFRAUD BY INTERFERENCE WITH GOVERNMENTAL FUNCTIONS

(a) Base Offense Level: 10

(b) Specific Offense Characteristic

(1) (If more than one applies, use the greater):

(A) If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greater (i) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (ii) exceeded $5,000, increase by the number of levels from the table § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(B) If the offense involved an elected official or any official holding a high-level decision-making or sensitive position, increase by 8 levels.

(c) Cross References

(1) If the offense was committed for the purpose of facilitating the commission of another criminal offense, apply the offense guideline applicable to a conspiracy to commit that other offense if the resulting offense level is greater than that determined above.

(2) If the offense was committed for the purpose of concealing, or obstructing justice in respect to, another criminal offense, apply § 2X3.1 (Accessory After the Fact) or § 2J1.2 (Obstruction of Justice), as appropriate, in respect to that other offense if the resulting offense level is greater than that determined above.

(3) If the offense involved a threat of physical injury or property destruction, apply § 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) if the resulting offense level is greater than that determined above.

(4) If the offense is covered more specifically under § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right), § 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), or § 2C1.3 (Conflict of Interest), apply the offense guideline that most specifically covers the offense.